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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. EDWARD GARCIA et al., Defendants and Appellants.	C066714 (Super. Ct. No. 07F09847)
THE PEOPLE, Plaintiff and Respondent, v. DAVID BALLESTEROS, Defendant and Appellant.	C066716 (Super. Ct. No. 07F09847)

In this case, we address an array of issues often found in prosecutions of gang-related shootings. Defendants Hector Garcia (Hector) and Edward Garcia (Edward), who

are brothers and fellow gang members, were in a vehicle with Sergio Rodriguez, Angela G. and others when they encountered Anthony Amaro and his companions in another vehicle. Amaro, a member of another gang subset, was Angela G.'s former boyfriend, and seeing Angela G. in the Garcia vehicle made him angry. Amaro's vehicle pursued the Garcia vehicle and struck it while the vehicle occupants yelled and threw objects at one another. Occupants in both vehicles were saying where they were from and flashing gang signs. After driving away from Amaro and his companions, the Garcias gathered several additional people. Thereafter, over the phone, Amaro challenged the Garcia group to fight and the Garcia group went to Amaro's location. Among those who joined the Garcia group were defendants Manuel Alvarez and David Ballesteros. Amaro and his companions, at least two of whom were armed with knives, were waiting. A fight ensued. During the confrontation, someone yelled the name of the Garcias' gang subset and someone flashed the subset's gang sign. At least two individuals struck Rodriguez with sticks or similar objects. Alvarez pulled out a .40-caliber handgun and fired it, emptying the magazine, killing Stephen Clay and wounding Ali Khan and Gary Motheral.

A jury found Alvarez guilty of murder in the first degree (Pen. Code, § 187, subd. (a); count one),[1] and two counts of attempted murder (§§ 664, 187, subd. (a); counts two & three), and found various firearm enhancements and a gang enhancement to be true (§§ 12022, subd. (a)(1); 12022.5, subd. (a); 12022.53, subds. (b), (c), (d), (e)(1); 186.22, subd. (b)(1)). The same jury found Hector and Edward guilty of murder in the first degree (§ 187, subd. (a); count one), and two counts of attempted murder (§§ 664/187, subd. (a); counts two & three), and found firearm enhancements and a gang enhancement to be true (§§ 12022, subd. (a)(1); 12022.53, subd. (e)(1); 186.22, subd. (b)(1)). A

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[1] Further undesignated statutory references are to the Penal Code in effect at the time of the charged offenses.

separate jury found Ballesteros guilty of voluntary manslaughter (§ 192, subd. (a); count one), and two counts of attempted voluntary manslaughter (§§ 664/192, subd. (a); counts two & three). The enhancement allegations against Ballesteros were found to be not true.

At sentencing, the trial court imposed aggregate prison terms as follows: 132 years eight months to life on Alvarez; 109 years four months to life on Edward; 143 years eight months to life on Hector, who had a prior strike conviction; and eight years on Ballesteros.

Defendants appeal, raising numerous contentions of trial and sentencing error. We reject Hector's and Edward's claim that the trial court abused its discretion when it denied an in limine motion to bifurcate the gang allegations because defendants failed to make a clear showing of a substantial danger of prejudice. We further conclude that the defendants have failed to demonstrate on appeal that the refusal to bifurcate resulted in gross unfairness amounting to a due process violation. Additionally, we reject Alvarez's claim that the verdict form for count one which included the words, "(First Degree Murder)" was insufficient to fix the degree as required by section 1157. And we conclude, contrary to Ballesteros's contention, that the trial court's error in failing to instruct on the misdemeanor manslaughter theory of involuntary manslaughter was not prejudicial.

However, based on the recently decided *People v. Canizales* (2019) 7 Cal.5th 591 (*Canizales*), we agree with Alvarez, Hector, and Edward that the trial court erred in instructing the jury on the kill zone theory of liability for attempted murder, and we cannot conclude that the error was harmless beyond a reasonable doubt. Therefore, we must reverse Alvarez's, Hector's, and Edward's attempted murder convictions on counts two and three. We also agree with Alvarez, Hector, and Edward that the true findings on the gang enhancement allegations were not supported by legally sufficient evidence in light of the California Supreme Court's opinion in *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*). We therefore vacate the true findings on the gang enhancement allegations.

We also vacate the true findings on the section 12022.53, subdivision (e)(1), vicarious use of a firearm enhancements as to Hector and Edward because those enhancement allegations were dependent upon a finding that the two violated section 186.22, subdivision (b). We also agree with Hector and Edward that, under *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), they cannot be convicted of first degree deliberate and premeditated murder as aiders and abettors under a natural and probable consequences theory, and conditionally reverse the first degree murder convictions as to Hector and Edward and remand for a retrial of those defendants on first degree murder, unless the People accept a reduction of the convictions to second degree murder.[2] Otherwise, we affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

The People's Case-in-chief

On August 19, 2007, Hector, Edward, Rodriguez, Hector's girlfriend Kristine Torres, Samantha S. and Angela G. were in Torres's car (the Garcia car) at a stop sign.[3] A car passed them, and Angela G. saw Amaro, also known as "Banks," in the car. Amaro was with Khan, Clay, and two women. Amaro turned his car around and started following the Garcia car, yelling and throwing bottles or cans. Amaro pulled his car alongside the Garcia car, and the occupants of the cars yelled at each other. According to Khan, both Amaro and the males in the Garcia car were throwing gang signs and "saying where they were from." Amaro rammed his vehicle into the Garcia car several times.

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[2] This procedure is without prejudice to Hector and Edward to petition in the sentencing court pursuant to newly enacted section 1170.95 for relief as to their murder convictions on count one, which we discuss in part XII. of the Discussion, *post*.

[3] Rodriguez and Torres testified for the prosecution pursuant to a cooperation agreement. In connection with his agreement, Rodriguez pled guilty to assault with a firearm. In connection with her agreement, Torres pled guilty to assault with a firearm and admitted a gang enhancement allegation under section 186.22, subdivision (b).

Kahn testified that Hector rammed Amaro's vehicle as well. Amaro turned his car in front of the Garcia car, which was forced to stop. Amaro and Kahn exited their car and went over to the Garcia car. One of the occupants of the Garcia car tried to get out, but Kahn prevented him from opening the door. Eventually, Kahn walked back to Amaro's car, and the Garcia car drove off.

Amaro drove to a nearby trailer park. There, he and his companions encountered Motheral, Motheral's brother, and Travis Vance. Kahn explained what had happened. Amaro called Angela G.'s cell phone and threatened and screamed at her. Amaro walked around the trailer park speaking on the phone, cursing and saying, "Bring it on."

Meanwhile, after the initial encounter, Hector and Edward were angry and "wanted to go handle it." They pressed Angela G. for contact information for Amaro. They parked on Peralta Avenue and the Garcias got out of the car while Rodriguez remained in the car with the girls. Alvarez and Ballesteros were standing nearby with Petey Martinez.

Angela G. told the group that Amaro was crazy and might have guns. Rodriguez heard someone in the group say, "[W]e don't care." Edward asked Hector if "they're strapped," and Hector responded that he was "pretty sure" they were. According to Torres, Alvarez said he was not worried, and that "they ha[d] theirs, too."

The Garcias and others got back in the Garcia car, while Alvarez, Ballesteros, and Martinez got into Ballesteros's white Monte Carlo, and they all drove back to Edward's house on Perktel Street. Amaro continued to call Angela G. and yell at her. When the Garcia group arrived at Perktel Street, Valdez and some others were there because Edward had called them and told them to meet him at his house.

Amaro called Angela G. again and told her to "tell 'em to meet us on Eleanor." Angela G. gave her phone to Edward and he and Amaro yelled at each other. Everyone left Perktel Street in three cars while Angela G. and Samantha S. stayed behind. Rodriguez went in Valdez's red truck with Valdez and Allen Appolon. Hector, Edward,

Ballesteros, and Martinez went with Torres in the Garcia car. Alvarez went alone in Ballesteros's white Monte Carlo. According to Torres, Alvarez was to go to the location first to be the lookout and "check out the scene." Torres acknowledged having stated in an interview with Detective Scott MacLafferty that Alvarez was "going to be looking out since he ha[d] the protection."[4] Ballesteros's jury heard that, in his interview with MacLafferty, Ballesteros admitted that he knew Alvarez had a gun at that time. The three cars drove to Eleanor Avenue.

On Eleanor Avenue, Amaro and his companions were waiting near an apartment complex. Kahn saw a number of cars pull up in front of the apartment complex. Kahn observed some sticks on the ground, retrieved them, and gave one to Motheral. Kahn also knew Clay carried a knife.

Khan saw Valdez get out of the red pickup truck wearing a red shirt, red sweats, and a red hat. According to Khan, Valdez pulled a chrome gun from his sweatpants and said, "Where in the fuck is Banks?" According to Rodriguez, however, when Valdez got out of his truck, he was holding a small bat. Rodriguez testified that he did not see Valdez with a gun.

Torres heard Martinez yell, "Gardenland" during the ensuing melee and thought Martinez threw his hands up to make an "L" sign for Gardenland. Torres also believed she heard one other person yell "Gardenland," but she did not know who. Rodriguez acknowledged that he had previously said in a statement to the police that, "some people were saying 'Gardenland' and just yelling that out." No witnesses testified at trial that

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[4] Torres also acknowledged telling Edward after this interview that she had told MacLafferty she knew Alvarez had a gun when the Garcia group went to Eleanor Avenue, and that Edward responded, "Why did you say that? That's going to look so much worse on everyone."

they heard anyone say "Norteño," "Norte," or any variant of the Norteño criminal street gang name.

A witness, who was at a child's birthday party in a yard nearby, observed a male wearing a white shirt and jean shorts, who was holding a large knife, run across the street towards some individuals in a car. He then ran back across the street. Torres observed a man with a knife, and retreated to her car.

Amaro, armed with a knife, squared off with Edward. According to Khan, Rodriguez advanced on him, attempted to punch him, then retreated. Vance and Khan each struck Rodriguez, one with a stick and one with a cane. Firefighter Emil Reitmayer, who was on a fire engine stopped nearby because it could not proceed due to cars being parked in the street, saw someone swing a stick or a bat striking another person who then fell to the ground. Reitmayer then saw someone run to a vehicle and reach into the vehicle. Shortly after that, gunfire erupted.

Rodriguez saw a muzzle flash coming from the direction of the white Monte Carlo, and heard 16 or 17 shots fired. Other witnesses and participants in the conflict reported hearing between six and 20 or more shots. Khan felt a bullet fly by his face and was then struck in the leg and fell to the ground. Motheral sustained a gunshot wound to the right side of his back. After the gunfire, everyone scattered.

Police arrived and secured the scene, and the firefighters from the fire engine rendered assistance. Reitmayer and another firefighter attended to Clay, who was lying face down on the ground. Clay did not have a pulse and was not breathing. He was pronounced dead at the scene. Police found a knife next to his body and a sheath for a knife was found in his pocket.

Police discovered 13 .40-caliber cartridge casings at the scene, as well as a number of bullet fragments. A forensic investigator performed a number of measurements at the scene. According to those measurements and the resulting diagrams, the closest cartridge casing was more than 90 feet west of Clay's body, and very roughly halfway across

Eleanor Avenue, which in total measured 30 feet one inch wide, to the north. Bullet fragments and possible bullet fragments were identified in the area of the apartment complex where Clay was shot. The distances each of the bullet fragments were located relative to each other is not clear. However, while several of the fragments were fairly close to each other, the bullet fragment farthest away from the others was located more than 33 feet to the east.

A forensic investigator testified concerning photographs depicting bullet strikes in the metal fence in front of the apartment complex. He identified bullet strikes in the fence at three locations that appear to have been made by three bullets. The first bullet strike appears midway up the height of the fence. A second, to the east of the first, appears near the middle of the fence but closer to the top than the first. The third, farther still to the east, is toward the top of the fence.

The 13 cartridge casings were all fired from the same firearm. Of the bullet and bullet fragments recovered, four were analytically useful, including a bullet recovered from Clay's body. Based on analysis of the relevant characteristics, these four bullets and bullet fragments could have been fired from the same firearm, and could have been loaded in the spent cartridge casings recovered from the crime scene. A .40-caliber Glock was the only handgun on the expert's laboratory list that matched both the cartridge casings and the bullet fragments.

A forensic pathologist who performed the autopsy on Clay determined that he sustained a single gunshot wound to his back. Based on the upward trajectory of the bullet in Clay's body, the pathologist opined that either the shooter was aiming the gun upward towards Clay, or Clay was "bent over, possibly either going to the ground, tripping and falling or running and bent over . . . ." The pathologist testified that Clay had a "very devastating" injury to his heart, and that, while he might have made it a step or two after being shot, "he wasn't going to go very far."

The morning after the shooting, Alvarez wanted everyone to get together, and Edward, Rodriguez, Valdez, Appolon, Ballesteros, and Alvarez met in the backyard of Rodriguez's house. Alvarez told everyone to keep their mouths shut and stay silent. Rodriguez asked Ballesteros, "[W]hy did you guys shoot?" Ballesteros pointed at Alvarez and said, "[D]on't ask me. He's the one that lit off the whole clip." Alvarez shrugged and smiled. Edward asked about the gun, and Ballesteros said that it was gone.

Two or three days after the shooting, police arrested Hector, but he was released after approximately one week. Shortly after his release, Hector, Edward, Rodriguez, and Torres went to Mexico to "chill out there for a while" because there was "too much heat out." They stayed in Mexico for four days before returning to Sacramento. However, shortly after returning, Torres and Hector went back to Mexico because Hector had no place to stay in Sacramento. Torres remained in Mexico for three weeks to a month. When she returned, Hector did not come with her.

Rodriguez testified that while they were in Mexico, Edward told him to make sure the police knew Edward was not the shooter and that he did not know there was a gun before the shooting. Edward and Hector told Rodriguez to tell the police they did not know Alvarez had a gun, "because if you knew there was a gun before the fact, that that [*sic*] is what will get you in real trouble."

Gang Testimony

According to Rodriguez, Hector and Edward were members of the Varrio Gardenland gang. When asked, "What was Gardenland to you," Rodriguez responded, "Just a gang of Nortenos on Northgate." When asked, "What is a Norteño," Rodriquez replied, "I don't know. A gang of Mexicans that claim red. I don't know." Rodriguez was not asked why he associated Gardenland with the Norteños. While they were in Mexico, Edward and Hector told Rodriguez that it was not going to look as bad for him as it would for them "because we gang bang."

Shown a photograph of a tattoo depicting the letters "GL," Rodriguez identified it as the tattoo on Edward's arm. Rodriguez said, "GL" stands for Gardenland. From another photograph, Rodriguez identified a tattoo on Hector's neck that read, "Gardenland." Hector had that tattoo when Rodriguez met him in 2006. Rodriguez further testified that Valdez and Martinez also claimed Gardenland.

Torres, Hector's girlfriend, testified that the "Gardenland" tattoo on Hector's neck represented the Gardenland gang and that Hector was a gang member in 2007. She testified that Hector "would claim Gardenland, and he would wear red, and stuff, but not so much about Norte, but more of his hood." Torres also identified Edward's "GL" tattoo on his arm depicted in a photograph and testified it stands for Gardenland. In another photo, Torres identified Hector throwing up an "L" with his hand and a person named Alfonso, who was throwing up a four with his hand, which Torres testified stood for 14. In a photograph taken in Mexico a couple of months before the shooting, Torres identified Appolon, Valdez and Edward. In this photograph, Valdez is depicted throwing up 14 (a single finger on one hand four fingers on the other) and Edward is throwing up an "L." Torres identified both Hector and Edward depicted in a photograph in which Edward is wearing a red hat, throwing up an "L" and has his arm around Hector, who is wearing a red shirt. In another photograph, Torres identified Valdez and Appolon, throwing up an "N," which Torres testified signified Norteño. When asked if Valdez was a Gardenland member, Torres claimed she did not know that for a fact, but acknowledged that he predominately wore red. She was not asked if she knew Valdez or Appolon to be Norteño gang members or what association Gardenland had with the Norteños.

Detective John Sample testified as an expert on criminal street gangs. He did not specifically testify that the Varrio Gardenland Norteños is a criminal street gang. Based on the prosecutor's hypothetical question related to whether the shooting would benefit

the Norteños, Sample opined that the charged crimes were committed for the benefit of the Norteño criminal street gang.[5]

Sample testified that Norteños identify with the color red and various representations of the letter "N," including the number 14 (because "N" is the fourteenth letter of the alphabet), often represented by a one and a four, by one dot and four dots, or by the roman numerals XIV.

He also testified about the history of the Norteños. In the late 1960's and early 1970's, a prison gang known as the Mexican Mafia, or "La eMe," was victimizing Hispanic gangs in the prisons. Another prison gang, Nuestra Familia, was formed to defend these inmates against La eMe. The Norteños became the street gang version of Nuestra Familia, and the Sureños became the street gang version of La eMe. Norteños and Sureños are bitter rivals.

According to Sample, Norteños in Sacramento are very turf-oriented and break down into subsets based on neighborhoods or varrios. Examples of Sacramento Norteño subsets include the Del Paso Heights Norteños, Oak Park Norteños, and Varrio Gardenland. In further describing what a subset is, Sample testified, "A subset is a branch of the larger gang," and continued: "For instance, Varrio Gardenland is a subset, a smaller group of Nortenos who associate themselves to a specific area in Sacramento, in a specific neighborhood." The prosecutor asked, "In terms of being Norteno and being a subset, are you a Norteno first?" Sample responded, "Yes. [¶] Again, the subset -- the Norteno is a big umbrella, if you will, and subsets are just underneath. That's why there are many Norteno subsets." Sample did not provide specific testimony organizationally

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[5] The prosecution primarily advanced a "for the benefit" theory under section 186.22, subdivision (b). However, Sample also opined that for the individuals who were not yet validated, the crime was committed "in association with validated" gang members.

connecting Varrio Gardenland to the Norteños other than his opinion that the former was a subset of the latter.

Sample estimated that there are approximately 1,500 validated Norteño members in Sacramento. He further estimated there are approximately 50 to 60 members of Varrio Gardenland.

Sample testified to what he called "commonalities" between a subset such as Varrio Gardenland and the larger Norteño group, stating that they shared identifying symbols, such as the number 14 and the color red. However, he further testified that the subset will also "have [its] own thing," such as Varrio Gardenland members throwing up the "L" sign, representing the "land" in "Gardenland."

Sample was not asked about how Varrio Gardenland or the Norteños are structured. Instead, he was asked a generic question about gangs in general. The prosecutor asked, "In terms of *how a gang is typically structured*, is there some loose structure to some of these gangs, and a formalized structure? [¶] Could you explain some that [*sic*] and give us some idea about *how street gangs are structured*." (Italics added.) Sample responded, "they are very loosely – especially street gangs, because a lot of times they are coming in and out of the prison systems or the jail system, based on some of their activities. [¶] So a lot of times the hierarchy portion of it -- you know, you will have people calling shots or they will call them the shot callers, or the, OG original gangsters, who are typically older guys." The "soldiers" or active participants are generally younger, in their teens and twenties. Sample explained there are often younger "wannabe[]s," in the age range of seven to 12 years old, "hanging around with a lot of gang members wearing the gang clothing, because they are watching their other friends in the neighborhood do that same type of behavior, and they are – they are mimicking their behaviors." Sample was not asked to identify any Norteño shot callers or OG's in Varrio Gardenland or opine that there were any among the Varrio Gardenland membership.

Asked on cross-examination if the "14 bonds" was "the basic constitution of the Nortenos in prison," Sample testified: "I have seen multiple constitutions . . . for Nortenos, depending upon which clique you're talking about."

Sample was asked what the primary activities of the Norteños are, to which he replied, murders, shootings, shootings into inhabited dwellings, carrying and possessing weapons and handguns, narcotics sales, car theft and carjacking. He did not opine that Varrio Gardenland had the same primary activities as the Norteños; nor was he specifically asked about the primary activities of Varrio Gardenland.

Sample testified about three separate predicate offenses, one of which involved a Varrio Gardenland member—Hector. According to Sample, on May 2, 2006, at a gas station in the Gardenland area, Hector, who was at that time a validated Varrio Gardenland member, punched an individual who was fueling his car and took the victim's car. Sample testified that, at the time of the carjacking, Hector was "wearing red and black shorts, red being a common color worn by Norteno gang members." After a vehicle and foot pursuit, police arrested Hector, who was subsequently confvicted of carjacking and resisting and obstructing an officer. Hector did not use a gun in the commission of this offense. The source of Sample's information on this crime was the report generated in the case.

The other two predicate offenses involved members of other Sacramento Norteño subsets. Sample testified that in 2005, Thomas Bursiaga, a validated Oak Park Norteño, shot and killed Victor Mares, whom he believed to be a Sureño. The shooting was in retaliation for the killing of Bursiaga's cousin by suspected Sureños. Bursiaga was subsequently convicted of murder. Sample obtained information about this crime by talking to homicide and gang detectives involved in the case and reviewing the report.

In the third predicate offense, in 2006, John Almeda and Perry Trujillo, validated West NIK Norteños, fired a gun into the residence of Angelo Zavala, a validated Varrio Franklin Boulevard Norteño. Almeda was convicted of being a felon in possession of a

firearm, and Trujillo was convicted of attempted murder. The source of Sample's information about this case was the reports concerning the shooting and conversations he had with the investigating detectives.

Documentary evidence in the form of certified court records was introduced as to each of the three predicate offenses.

According to Sample, individuals are "validated" as gang members by the Sacramento Police Department by satisfying two of a number of specified criteria, including wearing gang clothes, having gang tattoos, creating gang graffiti, committing gang crimes, associating with validated members, jail or prison correspondence indicating affiliation, and court-ordered gang registration.

Sample testified that, as of the date of the incident at issue here, Edward was a validated Varrio Gardenland Norteño. He had been validated based on gang tattoos, gang clothing, his admission to being a gang member, gang crimes, gang-related activities, and associating with validated gang members. In 2004, Edward was discovered in a stolen car with a validated gang member. In 2006, Edward was contacted by police while in the company of two validated Varrio Gardenland Norteños. Edward was wearing red clothing at the time. Additionally, Edward had gang tattoos. Edward was also contacted in the presence of a validated Norteño in 2007, after they had called some of their neighbors "scraps," a derogatory term Norteños use against Sureños. According to Sample, Edward acknowledged being a Varrio Gardenland Norteño.

Sample also testified about the several photographic exhibits in which Edward was depicted throwing up Gardenland gang signs. In one photograph, which Torres said had been taken in Mexico, Sample identified Edward throwing up an "L," and another individual (previously identified as Valdez by Torres) throwing up one finger on one hand and four on the other, representing the number 14. The third individual in the photo (previously identified as Appolon by Torres) is throwing up either a "W" or an "N," Sample was not sure. The letter "N" references Norteños and "W" would be to represent

"west side," which would be a reference to the west side of the canal that divides Gardenland from Del Paso Heights. The west side of the canal is Gardenland. Sample also testified about the photograph depicting Edward's tattoo, explaining that the "GL" stands for Gardenland. He also testified about another photograph depicting Edward throwing up an "L" for Gardenland while in the company of an individual wearing a red hat and red shirt consistent with the colors Norteños wear.

Describing the circumstances resulting in Hector's validation, Sample noted that Hector had also admitted to being a Varrio Gardenland Norteño. During the carjacking incident, Hector was wearing red clothing. In 2007, Hector was arrested for selling marijuana while in the company of a validated Norteño gang member, Hernandez. Sample identified Hernandez in a photograph in which Hernandez is standing next to Hector throwing up four fingers while Hector is throwing up an "L." Sample identified Hernandez in another photograph where Hernandez was throwing up an "L" for Gardenland. Sample also noted that Hector had gang tattoos, one on his neck depicted in the photograph that says "Gardenland" and another, apparently not depicted in a photograph but documented in reports Sample had reviewed, that read "SK." Sample explained that "SK" stands for "Sureño killer" or "scrap killer."

Sample testified that, at the time of the shooting, Alvarez had not been validated as a gang member. However, Sample testified that, based on his knowledge of Alvarez as of the time of trial, he could validate Alvarez as a gang member. This opinion was based on Alvarez's involvement in the charged crimes, his association with validated gang members, gang graffiti and a gang photograph discovered at Alvarez's home, and Alvarez being identified by a validated member as a member of Varrio Gardenland. One photograph found in Alvarez's home depicted him in the middle of a group of five young men. One of the other young men is throwing up an "L" for Gardenland with one hand and four fingers for the number 14 on the other. Two stolen state highway signs with graffiti found next to and under Alvarez's bed bore the letters "SK" with a line drawn

through the "S." Sample testified that Norteños cross out the "S" to show disrespect to Sureños. Both signs also bore the letters "GL" for Gardenland.

Sample also testified that, as of the time of trial, he could validate Ballesteros as a gang member. Sample based his opinion on Ballesteros's contacts while in the presence of validated Norteño members and his involvement in the charged crimes.[6]

According to Sample, in gang culture, respect is a form of "currency" and is extremely important. Unlike ordinary citizens, gang members give or gain respect through fear and intimidation, specifically by threats and the use of violence. They react with violence when they are disrespected. Often, a very small incident can occur between gang members who had no prior feud which will escalate into something much bigger. Respect is the "root cause of a lot of the reasons these shootings happen."

Sample also testified that "reputation is everything to a gang." Therefore, if a gang member does not respond to a threat or challenge, that gang member's reputation will suffer and he or she will be perceived as "weak" or as "a punk." Other gang members do not associate with such gang members. Asked about a situation where a group of gang members are going to a location to fight someone and one of them declines to go, Sample testified that such a person would be perceived as weak. Also, that person would not be trusted because he "wouldn't seem like somebody down for the cause." On the other hand, anyone who goes along would benefit the gang by adding to the number

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[6] Sample also testified that Martinez was a validated Varrio Gardenland gang member at the time of the shooting. Valdez was not validated at the time of the shooting, but, based on Sample's research after the shooting, Sample validated Valdez as a member of the Norteños. With regard to Valdez, the prosecutor asked Sample whether he was a Norteño; the prosecutor did not ask Sample if Valdez was a member of Varrio Gardenland. Rodriguez was not validated. He had no prior gang contacts or history of associating with these gang members. His only contact related to the instant offenses. Nor was Appolon validated, as he had only one prior contact that was not necessarily gang-related.

of people in the group. The more people in the group during a confrontation "adds to that fear and intimidation factor."

Because guns are the ultimate means by which to instill fear and carry out violence, guns are a "tool of the trade" for gang members, according to Sample. He testified that "the ultimate source of the violence to obtain that fear and intimidation is either carrying, showing, displaying, or using firearms." When a gang member is caught without a gun, that gang member is said to have been "caught slippin."

Sample testified that at the scene of a violent confrontation, gang members may state their gang name or throw up gang signs to claim responsibility for their actions. Gang members "[w]ant people to know what [they] are all about. . . ." "[R]eputation is extremely important, and if you want to be known for violence, you're gonna let everybody know this is what you're about, and this is what you do."

Asked about a hypothetical situation involving circumstances essentially duplicating those at issue here, Sample testified that the shooting would benefit the Norteño gang because the incident would enhance the Norteños' reputation for violence. "[T]hey were responding to a challenge that was put out to them, and they were not gonna be shown up in that challenge, and they responded and rose to that challenge."

Related to the part of the prosecutor's hypothetical question where one or multiple people yelled out "Gardenland" during the altercation, Sample said, "that would benefit the Norteños." Announcing the name of the gang allows the perpetrators to take credit for the crime; they are telling people who is responsible for it and what they are about.

Sample testified that Amaro was a validated Del Paso Heights Norteño. Asked whether the crime would still benefit the Norteños if one of the people the gang goes to fight is also Norteño, Sample testified that the crime would benefit the Norteño who did the shooting as well as the Norteño gang in general. Because both Norteño groups are fighting, they both enhance their reputations for violence, but the group that commits the shooting would develop an even more extreme reputation for violence.

Evidence Presented by Edward

Matthew Cortez was a close friend of Edward who grew up in the Gardenland neighborhood. Cortez and Edward planned to enlist in the military together, but, according to Cortez, Edward "failed the test a couple times, and we were gonna work on him passing." Cortez acknowledged that there were gangs in the Gardenland neighborhood, but stated that neither he nor Edward was involved. Cortez testified that Edward was not into gangs or gang activities. In Cortez's opinion, neither Edward nor any of the other defendants were "extremely violent" individuals, and he testified that Edward was not violent at all.

Edward testified that, when he arrived at his house on Perktel Street following the initial confrontation with Amaro, he was not planning on doing anything. There were a number of people there, including Valdez, Appolon, Ballesteros, Alvarez, and Rodriguez, but Edward testified that he had not talked to anyone on the phone about the confrontation.

According to Edward, Rodriguez was still upset and was saying, "[w]e should go whip their ass," but Edward did not agree. Amaro called Angela G., and she stated that Amaro wanted to fight one of the guys. Edward did not hear any remarks about Amaro being crazy, and he did not hear anything about guns. Eventually, Edward left his house with the others, assuming that he was going to Eleanor Avenue and that there would be a fight. Edward testified that he "just went because my brother went and my friend." Edward was not prepared to fight, but would do so if he had to.

As the cars pulled up at Eleanor Avenue, Edward observed five or six guys standing by an apartment building. Initially, Edward did not see any weapons. However, after he exited the car, he observed that the guys by the apartment building had sticks. Edward saw people squaring off with Rodriguez. Edward then observed two guys approaching him, one of whom was trying to conceal a knife. Edward began to back away. He then yelled to Rodriguez, "[C]ome on, come on, let's go." The guy with the

knife ran at Edward and swiped the knife at Edward. The guy then backed up and returned to the area near the apartment building. Edward then saw someone hit Rodriguez on the head, and, immediately thereafter, Edward heard gunshots. He did not see who was shooting. Edward crouched down and then ran back to the car. Edward, Ballesteros, Martinez, Hector, and Torres piled into the car and drove back to Peralta Avenue.

At Peralta Avenue, Edward and his companions congregated in the backyard and talked about the incident. Edward did not know who fired the gun. He thought someone from the other group shot at his group. Martinez said Alvarez fired the shots.

The following day, Valdez called a meeting. Ballesteros, Alvarez, Valdez, and Appolon met Rodriguez and Edward at Rodriguez's house. Alvarez instructed everyone not to say anything about the shooting. Rodriguez and Edward asked, "[W]hy did you guys shoot," and Ballesteros responded, "[A]sk him," referring to Alvarez. Alvarez did not respond.

When asked if he was a gang member, Edward responded, "Yes, I guess you could say that." He admitted that he was in the Gardenland or VGL gang, but asserted that it was "not the way the gang detective described it." He never "put any work in" for the gang, and he never got anything out of being a gang member.

Evidence Presented by Alvarez

Alvarez testified that he and Ballesteros were driving in Ballesteros's Monte Carlo when they ran into Hector and the others in the Garcia car, and they followed them to Hector's house on Perktel Street. There was talk among some of the people of going over to Eleanor Avenue to fight. Alvarez testified that he was not paying much attention to the discussion. He claimed he never said anything about having a gun or being strapped or anything like that, and he did not hear anyone else say anything to that effect. He denied having a gun. However, he knew that there was a gun in the front seat of the

Monte Carlo between the passenger seat and the center console. Alvarez testified that he had not placed the gun there; it was there when he got in the car earlier that day.

Eventually, everyone started getting into the cars, and Alvarez figured they were going to Eleanor Avenue. He tried to get into the Garcia car, but it was full. Valdez's truck was full too. Ballesteros gave Alvarez the keys to his Monte Carlo and told him to drive it. Martinez suggested Alvarez drive by the area first to see if there were a lot of people around. However, immediately after Alvarez got the keys to the Monte Carlo and got in, Torres pulled away in the Garcia car, so Alvarez followed in the Monte Carlo.

When he arrived on Eleanor Avenue, Alvarez observed a group of people standing nearby. One of the individuals approached his group, and, as he drew nearer, Alvarez observed that the individual was holding a large knife. As the scene became more chaotic, Alvarez was thinking he should leave, particularly because he believed that police would soon be on the way, and he did not want to get caught with the gun in the car. Alvarez yelled to Ballesteros that they should leave. Alvarez then observed individuals fighting. Someone hit Rodriguez with a stick, and Rodriguez fell. Alvarez then observed the individual who had the knife approaching Rodriguez. Alvarez also saw another individual with a knife running toward Rodriguez.

Alvarez testified that he reached into Ballesteros's Monte Carlo and grabbed the gun. He pointed the gun in the air and fired three shots. No one reacted. One of the guys with a knife was still going towards Rodriguez, who was trying to get up off the ground. There were still two individuals with sticks nearby. Alvarez did not think that they were going to let Rodriguez go. Alvarez observed Clay wielding a knife, approach to within eight to 10 feet of Rodriguez. Alvarez pointed the gun at Clay and started shooting. He acknowledged that he was trying to shoot Clay. He testified: "I'm trying to shoot the guy that I seen running over there." Alvarez kept shooting until the gun stopped firing. He then rushed back to the Monte Carlo, threw the gun in the car, got in, and took off.

Several days later, Alvarez disposed of the gun by throwing it in the trash. At the meeting at Edward's house, Alvarez encouraged everyone not to talk to the police. Alvarez denied being a member of the Varrio Gardenland gang or any gang.

Evidence Presented by Hector

Detective MacLafferty testified that a witness to the incident told him that the shooter fired at least the first shot "up in the air."

Evidence Presented by Ballesteros

Julian Simental, Ballesteros's brother, testified that Alvarez had a gun. Simental saw the gun in Alvarez's dresser, perhaps eight months to a year before the shooting. While it could have been a .40-caliber, Simental testified that Alvarez said it was a "nine." Simental also testified that Ballesteros did not have a gun.

According to Simental, Alvarez told him that everyone had gone to Eleanor Avenue to watch a fight. However, it did not go as they expected, and, when Alvarez saw someone with a knife about to stab one of his friends, he panicked, got his gun, and "let loose till the crowd broke up."

Trino Savala testified as an expert on criminal gangs. Savala testified that he was a gang prevention specialist. He had previously been a Norteño gang member and a prison gang member, and had spent approximately 19 years in jail or prison. In prison, he rose to the rank of maestro. As a maestro, it was his job to educate new northern Hispanics in the prison "about our cause, about our movement, . . . what we're about." Savala "dropped out" of the gang in 1997. After he left prison, he went to school and became a counselor, counseling youthful gang members. He described his task in this case as being to prove that Ballesteros was "not . . . a Gardenland Norteño."

According to Savala, gang activity in Sacramento is "very organized," and is controlled by prison gang members. Asked whether there is a specific Norteño gang that controls the Gardenland area, Savala answered, "Every neighborhood in Sacramento has a safehouse . . . . It's a place where people who parole from prison . . . report to get their

orders to do what they need to do out here in the street. [¶] So most every neighborhood has 'em . . . they call them regiments or safehouses that run all the Norteños." At each safehouse, there is a head of household or HOH, who is in charge of the area and has his foot soldiers, people from prison who are Norteños. Savala was not asked whether the Gardenland neighborhood had a Norteño safehouse, regiment, or HOH.

Savala opined that Ballesteros was not a gang member and had no connection to any Norteño gang.[7] On recross-examination, Savala testified that he did not believe Gardenland was a Norteño subset but did not explain why he was of that belief, and no additional questions were asked of him on this point. He also testified that "[t]here is a lot of kids from every neighborhood in Sacramento, they claim Norte. They claim this, they claim that, but they've never actually been -- have ties to the actual criminal organization Norteños." He testified repeatedly about individuals displaying "wannabe" behavior.

People's Rebuttal Evidence

John Trefethen, a criminal investigator for the Sacramento County District Attorney's Office, located a 2006 Chevy Monte Carlo similar to Ballesteros's car and a .40-caliber Glock Model 22, similar to the gun used during the shooting. He attempted to wedge the gun between the seat and the center console so it would not be visible from the passenger window to someone outside of the vehicle, but he could not do so. The seat upholstery was too tight against the console. Trefethen acknowledged that the Glock Model 22 is approximately one-half inch longer than a Glock Model 23.

Verdict and Sentencing

A jury found Alvarez guilty of murder in the first degree (§ 187, subd. (a); count one), and two counts of attempted murder (§§ 664/187, subd. (a); counts two & three),

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[7] Savala arrived at this opinion by asking people in the neighborhood about Ballesteros. On cross-examination, he testified that he did not ask any of these people their names.

and found the personal use firearm enhancement allegations (§§ 12022, subd. (a)(1), 12022.5, subd. (a), 12022.53, subds. (b), (c), (d), (e)(1)) and the gang enhancement allegation (§ 186.22, subd. (b)(1)) to be true.

The same jury found Hector and Edward guilty of murder in the first degree (§ 187, subd. (a); count one), and two counts of attempted murder (§§ 664/187, subd. (a); counts two & three), and found the vicarious use firearm enhancement allegations (§§ 12022, subd. (a)(1), 12022.53, subd. (e)(1)) and the gang enhancement allegation (§ 186.22, subd. (b)(1)) to be true.

A separate jury found Ballesteros guilty of voluntary manslaughter (§ 192, subd. (a); count one), and two counts of attempted voluntary manslaughter (§§ 664/192, subd. (a); counts two & three). The firearm and gang enhancement allegations against Ballesteros were found not true.

The trial court sentenced Alvarez to an aggregate term of 132 years eight months to life, calculated as follows: 25 years to life on count one, murder; a determinate term of seven years on count two, attempted murder; a determinate term of two years four months on count three, attempted murder (one-third of the midterm); three additional terms of 25 years to life attached to each count for the personal use of a firearm causing great bodily injury or death enhancements; 10-year terms on counts one and two for the gang enhancements; and a three-year-four-month term on the gang enhancement on count three (one-third of the term), with all sentences to run consecutively.

Hector, who had a prior strike conviction requiring that each term be doubled pursuant to section 667, subdivision (e), was sentenced to an aggregate sentence of 143 years eight months to life, calculated as follows: 50 years to life on count one, a determinate term of 14 years on count two, and a determinate term of four years eight months on count three (one-third the midterm), and three additional terms of 25 years to life for the vicarious use of a firearm causing great bodily injury or death enhancements on counts one through three, with all sentences to run consecutively.

The trial court sentenced Edward to an aggregate term of 109 years four months to life, calculated as follows: 25 years to life on count one, a determinate term of seven years on count two, and a determinate term of two years four months on count three (one-third the midterm), and three additional terms of 25 years to life for the vicarious use of a firearm causing great bodily injury or death enhancements on counts one through three, with all sentences to run consecutively.

The court sentenced Ballesteros to an aggregate term of eight years, calculated as follows: the midterm of six years on count one, one year on counts two and three (one-third the midterm), and one year on count three (one-third the midterm), with all terms to run consecutively.

DISCUSSION

I. Denial of Motion to Bifurcate the Gang Enhancement Allegation

A. Additional Background

Prior to trial, Edward's attorney moved in limine to bifurcate the gang allegations from the substantive charges. He specified that he was not seeking an order limiting the prosecution from putting on evidence with gang overtones and which implicated the operative facts of the shooting. Rather, he was moving to bifurcate the gang allegations from the substantive offenses so as to limit the prosecution to only those facts necessary to prove that the substantive offenses were committed by Edward. However, he further argued that this case "involves a probably drunken assault by the alleged victims in which the shooter's gang motivation, if any, is collateral and largely irrelevant to the substantive offense" charged. He further argued that "evidence of gang membership or affiliation" would be "extremely inflammatory." And he argued that the gang allegations would allow the jury to hear evidence of "prior uncharged acts, prior convictions and associations with others who have been labeled 'gang members.' " Hector's and Alvarez's attorneys orally joined in the motion.

In its written offer of proof and opposition to the bifurcation motion, the prosecution asserted: "the evidence of the underlying shooting necessarily involves the same evidence to be presented in establishing the enhancement. The case is one in which a group of people, acting together, with similar motivation and similar intent assemble and agree to go fight. A large aspect of the case will be whether or not the individual defendants aided and abetted the fight and aided and abetted one another in the commission of the crime itself and/or other target crimes wherein murder was a foreseeable outcome. The law clearly allows the People to present evidence of the association between the individuals, their respective and group motivations, and their respective and group intentions, to allow the jury to determine whether the defendants charged were indeed aiding and abetting one another. That they are members of the same gang, with the same desire to avenge an act of disrespect to one of their friends would tend to support they . . . aided and abetted one another and aided and abetted target crimes and/or the crime of murder itself. [¶] This evidence of motivation, intent and association would be admissible pursuant to Evidence Code section 1101(b) even if the People had not alleged a gang enhancement."

Hector's attorney also made a *Castro*[8] motion to preclude the prosecution from presenting evidence of Hector's 2006 carjacking conviction in the event that he testified. The prosecution responded that evidence of Hector's prior conviction was admissible as to both the "predicate offenses" requirement and the "primary activities" requirement of the gang enhancement allegation pursuant to section 186.22. Hector's attorney objected to evidence of Hector's carjacking conviction on Evidence Code section 352 grounds, contending that there were many other ways in which the prosecution could prove the gang enhancement allegation. Specifically, he argued that the prosecution had other

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[8] *People v. Castro* (1985) 38 Cal.3d 301. Hector did not testify, so the court's ruling on the *Castro* motion is not an issue on appeal.

predicate offenses that could be used and that there was other evidence the prosecution could rely upon in establishing Hector's gang membership. Thus, according to Hector, the prejudicial effect of hearing about his carjacking outweighed the probative value.

During argument on the motion, Edward's attorney contended that the prosecution could argue its case by discussing the individuals as a generic group rather than as members of a Norteño gang. He asserted that the jury could reach its determinations as to whether an individual joined others or was part of a conspiracy or agreement to do harm with others, or was acting in self-defense or defense of others, without reference to a gang. Alvarez's attorney argued that, prior to the events at issue here, there was no indicia of gang activity concerning Alvarez. Because of this, he argued that bifurcation was particularly appropriate as to him.

The prosecutor argued the bifurcation would undermine the prosecution's case because the motivation for the crimes was at issue, as were issues of self-defense and whether defendants intended to aid and abet each other. The prosecutor asserted that the gang evidence helped establish the underlying crime.

In anticipation of the court denying the bifurcation motion, Edward's attorney asked the court to give an instruction concerning the limited purpose of the gang evidence. The court pointed out that there is a CALCRIM instruction directly on point. Hector's attorney asked that the limiting instruction include Hector's prior conviction and the court invited counsel to offer a proposed instruction.

The trial court denied the motion to bifurcate. The court stated that, based on the evidence set forth in the motions and preliminary hearing, the evidence involving the murder and attempted murders involved gang motive evidence, including the prominent display of the color red, Gardenland gang signs and the invocation of the terms "Norte,"

and "Gardenland," and a reference to "mob shit." [9] As for Evidence Code section 352, the trial court found that the probative value of the evidence substantially outweighed any prejudicial effect.

Regarding Hector's prior conviction, the trial court observed that Hector had denied the truth of the section 186.22, subdivision (b), allegation and that the prosecution would be required to prove all elements of that allegation, including the predicate offenses. The court ruled that Hector's conviction was admissible to prove a gang enhancement predicate offense.

B. Defendants' Contentions

Hector and Edward contend that the trial court erred in denying their in limine motions to bifurcate.[10] They assert that the gang enhancement should have been bifurcated "in whole or in part," and in addition, the court abused its discretion in allowing the prosecution to present evidence of Hector's prior conviction in its case-in-

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[9] As indicated in our summary of the trial evidence, there was testimony that someone yelled "Gardenland." However, at trial, there was no evidence that someone yelled "Norte" or "mob shit."

[10] Hector and Edward are the only defendants who raise the bifurcation issue in their opening briefs on appeal. Alvarez and Ballesteros purport to join in all arguments raised in codefendants' briefs that would be beneficial to them. However, neither Alvarez nor Ballesteros supplied any argument on the issue of bifurcation or any claim of prejudice specific to each of them individually. Joinder in appellate argument may be broadly permitted (Cal. Rules of Court, rule 8.200(a)(5)), but each appellant has the burden of demonstrating error *and prejudice*. (*People v. Nero* (2010) 181 Cal.App.4th 504, 510, fn. 11 (*Nero*).) Here, as we discuss *post*, a defendant must show that at trial, they made a clear showing of a substantial danger of prejudice to establish that the trial court abused its discretion, and if the trial court did not abuse its discretion, they must show on appeal that the refusal to bifurcate resulted in gross unfairness amounting to a due process violation. These showings necessarily must relate to facts and rely on arguments specific to each defendant. Inasmuch as Alvarez's and Ballesteros's joinder was an attempt to raise the bifurcation issue, their reliance solely on the Garcias' arguments and reasoning is insufficient to satisfy their burdens on appeal. Accordingly, we address bifurcation only as to the Garcia defendants.

chief rather than in a bifurcated proceeding. Hector and Edward claim that the evidence relevant to the gang enhancement allegations was unduly prejudicial and posed an unacceptable risk that the jury would convict them based on their gang associations. They emphasize that evidence of Hector's prior conviction was admitted as a predicate offense to prove the gang enhancement, and assert that, if the matter were bifurcated, this evidence would not have been admissible in the prosecution's case-in-chief as to the underlying charges. They analogize to the factors to be considered on a motion to sever, and assert that they demonstrated that bifurcation was appropriate. According to Hector and Edward, the denial of the motion to bifurcate deprived them of their due process right to a fair trial. We conclude that the trial court did not abuse its discretion in denying the motion to bifurcate. Nor have Hector and Edward established a due process violation.

C. Gang Enhancement Bifurcation Principles

"Bifurcation of gang allegations is appropriate where the gang evidence is 'so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt.' " (*People v. Franklin* (2016) 248 Cal.App.4th 938, 952 (*Franklin*), quoting *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (*Hernandez*).) As we will discuss, when reviewing the denial of a motion to bifurcate a gang enhancement, we must engage in a two-step analysis: (1) we look to the evidence before the trial court at the time of the ruling to determine whether the defendant made a clear showing of a substantial danger of prejudice such that the trial court's refusal to bifurcate was an abuse of discretion; and (2) if the trial court did not abuse its discretion based upon the evidence before it at the time of the ruling, we look to whether the defendant has demonstrated that the refusal to bifurcate resulted in gross unfairness amounting to a due process violation based on the evidence that actually came out at trial and other trial-related matters.

1. Substantial Danger of Prejudice - Abuse of Discretion

First, we review a trial court's ruling on a defense motion to bifurcate "for an abuse of discretion, based on a review of the record that was before the trial court at the time of the ruling." (*People v. Burch* (2007) 148 Cal.App.4th 862, 867 (*Burch*) [refusal to bifurcate prior prison commitment enhancement]; accord, *Franklin, supra*, 248 Cal.App.4th at p. 952 [refusal to bifurcate gang enhancement allegations]; see also *People v. Merriman* (2014) 60 Cal.4th 1, 37 (*Merriman*) [an appellate court evaluates claims that the trial court abused its discretion in denying severance or ordering consolidation in light of the showings made and the facts known by the trial court at the time of the court's ruling]; *People v. Homick* (2012) 55 Cal.4th 816, 848 [we review a trial court's denial of a severance motion for abuse of discretion based on the facts as they appeared when the court ruled on the motion]; *People v. Mendoza* (2000) 24 Cal.4th 130, 161 (*Mendoza*) [in determining whether the trial court abused its discretion in denying a defendant's severance motion, we examine the record before the trial court at the time of its ruling].) We do not consider trial evidence not made apparent to the trial court in limine or events that take place during the trial, such as the prosecutor's argument, in deciding whether the trial court abused its discretion in denying bifurcation at the beginning of the trial. Our determination must be based "on the record as it stood at the time of the ruling." (*Franklin*, at p. 952.)

"To establish [the] criminal street gang enhancement, the prosecution must prove some facts in addition to the elements of the underlying crime, for example, that the criminal street gang has engaged in a 'pattern of criminal gang activity.' [Citation.] Accordingly, when the prosecution charges the criminal street gang enhancement, it will often present evidence that would be inadmissible in a trial limited to the charged offense." (*Hernandez, supra*, 33 Cal.4th at p. 1044; see § 186.22, subd. (b)(1).) In *People v. Calderon* (1994) 9 Cal.4th 69 (*Calderon*), the California Supreme Court held that, pursuant to the authority granted to the trial courts under section 1044 to control the

proceedings during trial, " 'a trial court has the discretion, in a jury trial, to bifurcate the determination of the truth of an alleged prior conviction from the determination of the defendant's guilt of the charged offense.' " (*Hernandez,* at p. 1048, quoting *Calderon,* at p. 72.) In *Hernandez*, our high court considered the defendants' contention, based on *Calderon*, that the trial court should have bifurcated the trial, trying the underlying charge first, and, if they were found guilty, then the gang enhancement allegation. (*Hernandez,* at p. 1048.) The court noted that a gang enhancement is a different matter than a prior conviction such as that at issue in *Calderon.* (*Ibid.*) There is less need for bifurcation, as a general matter, in addressing the gang enhancement because, unlike a prior conviction, "the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*Ibid*.) Nonetheless, acknowledging that evidence of predicate offenses may be unduly prejudicial, the *Hernandez* court stated that the same authority that permitted bifurcation in *Calderon* permits bifurcation of the gang enhancement. (*Id.* at p. 1049.)

However, the *Hernandez* court noted that "evidence of gang membership is often relevant to, and admissible regarding, the charged offense." (*Hernandez, supra*, 33 Cal.4th at p. 1049.) "Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Ibid*.) Regarding motive, the court in *Franklin* observed that " ' "[b]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." ' " (*Franklin, supra,* 248 Cal.App.4th at p. 953.)

The *Hernandez* court specified that, "[e]ven if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself—for example, if some of it might be excluded under Evidence Code section 352 as

unduly prejudicial when no gang enhancement is charged—a court may still deny bifurcation." (*Hernandez, supra*, 33 Cal.4th at p. 1050; see also *People v. Garcia* (2016) 244 Cal.App.4th 1349, 1357 (*Garcia*).) The court emphasized that "the trial court's discretion to deny bifurcation of a charged gang enhancement is . . . broader than its discretion to admit gang evidence when the gang enhancement is not charged." (*Hernandez,* at p. 1050; see also *Franklin*, *supra*, 248 Cal.App.4th at p. 952; *Garcia*, at p. 1357.) Addressing the benefits of trying the issues together, the *Hernandez* court, analogizing bifurcation to severance, noted that " '[t]rial of the counts together ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials.' " (*Hernandez*, at p. 1050, quoting *Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.) The efficiencies achieved by a unitary trial in the bifurcation context have been "consistently recognized" by the courts. (*Garcia,* at p. 1357.)

In *Hernandez*, the defendant was charged with robbery along with a codefendant who was a member of an ally gang. (*Hernandez*, *supra*, 33 Cal.4th at pp. 1045, 1046.) During the robbery, defendant invoked the name of his gang. (*Id*. at pp. 1045, 1050-1051.) Two predicate offenses involving the defendant's gang were introduced into evidence. (*Id*. at p. 1046.) Addressing the merits of the defendants' claims, the court reasoned that "[m]uch of the gang evidence here was relevant to the charged offense." (*Id*. at p. 1050.) The defendant injected his gang status into the crime by identifying himself as a gang member and using that status in demanding money from the victim. (*Id.* at p. 1051.) The expert's testimony helped the jury understand the significance of the defendant's announcement of his gang affiliation, which was relevant to motive and the use of fear. (*Ibid*.) Evidence concerning the alliance between the defendant's gang and that of his codefendant explained why the two were acting together in the commission of this crime, "thus buttressing such guilt issues as motive and intent." (*Ibid*.) In an apparent reference to the predicate offenses and primary activities testimony, the court

stated: "Even if some of the expert testimony would not have been admitted at a trial limited to guilt, the countervailing considerations that apply when the enhancement is charged permitted a unitary trial." (*Ibid*.) The court went on to note that the predicate offenses were not particularly inflammatory, no confusion with collateral issues arose from their introduction, and they were not offenses for which the defendant escaped punishment. (*Ibid*.) Thus, the *Hernandez* court concluded: "Any evidence admitted solely to prove the gang enhancement *was not so minimally probative on the charged offense, and so inflammatory in comparison, that it threatened to sway the jury to convict regardless of defendants' actual guilt*. Accordingly, defendants *did not meet their burden 'to clearly establish that there is a substantial danger of prejudice* requiring that the charges be separately tried.' " (*Id.* at p. 1051, italics added.) Thus, the *Hernandez* court concluded that the trial court acted within its discretion in denying bifurcation. (*Ibid*.)

In *Franklin*, the defendant was convicted of various domestic violence related offenses, residential burglary of the victim's home, false imprisonment, and criminal threats. Gang enhancements were alleged as to each offense, but the jury ultimately found those allegations true only as to the false imprisonment and criminal threats charge. (*Franklin, supra*, 248 Cal.App.4th at pp. 941-942.) The threats to the victim included, among others, that she "would live to regret fuckin with a real gangster" and that she should "just watch what *we* do to your mom when she comes home from work." (*Id*. at pp. 942-943, italics added.) While they were dating, the defendant bragged to the victim about his status in the gang hierarchy, telling her that "his homeboys were all scared of him." (*Id*. at pp. 944-945.) Evidence of two predicate crimes committed by members of the defendant's gang were introduced. Those predicates were a conviction for illegal weapon possession and a conviction for assault with a deadly weapon. (*Id*. at pp. 945, fn. 8, 949.) On appeal, the *Franklin* court concluded that there was insufficient evidence to prove the gang enhancement allegations and the court struck the true findings. (*Id*. at p. 952.) However, the court held that the trial court did not abuse its discretion in

denying the defendant's bifurcation motion at the beginning of the trial. (*Id*. at p. 953.) This was so because the prosecution's theory was that the defendant's motive in committing the crimes was to protect his status in the gang and strike back at the victim for publicly disrespecting him and disrespecting his gang. (*Ibid*.) Thus, the gang evidence was relevant to the prosecution's theory of motive. (*Ibid*.)

As can be seen from both *Hernandez* and *Franklin*, the mere fact that predicate offense and primary activities testimony is introduced to prove gang enhancement allegations does not mean that a court abuses its discretion by refusing to bifurcate those allegations from the trial on the substantive offenses. A defendant must " 'clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' " (*Hernandez, supra*, 33 Cal.4th at p. 1051; *Garcia, supra*, 244 Cal.App.4th at p. 1357.)

2. Gross Unfairness - Due Process Violation

Second, even if a trial court does not abuse its discretion based on the record before it at the time it ruled on the motion, reversal is required "if the defendant shows the failure to bifurcate resulted in ' "gross unfairness" amounting to a denial of due process.' " (*Franklin, supra*, 248 Cal.App.4th at p. 953; *Burch, supra*, 148 Cal.App.4th at p. 867, quoting *Mendoza, supra*, 24 Cal.4th at p. 162, and *People v. Arias* (1996) 13 Cal.4th 92, 127 (*Arias*); see also *Merriman, supra*, 60 Cal.4th at p. 46 [severance motion].) This second part of the analysis can be based on trial evidence and other trial-related matters. (See *People v. Ybarra* (2016) 245 Cal.App.4th 1420, 1434 (*Ybarra*) [severance analysis involves two steps; if the trial court did not abuse its discretion in denying severance based upon the evidence before it at the time of the ruling, "we look to whether the defendant has demonstrated that the joinder resulted in 'gross unfairness' amounting to a due process violation based on the trial evidence and other trial related matters, such as the prosecutor's closing argument"].)

We shall now apply this two-step analysis to the trial court's exercise of discretion in denying bifurcation.

D. Abuse of Discretion Analysis

1. Gang Evidence

Here, in denying the motion to bifurcate, the trial court concluded that the evidence in the offer of proof established that the underlying crimes involved gang motives. In this regard, this case is similar to *Hernandez, supra*, 33 Cal.4th 1040, and *Franklin, supra*, 248 Cal.App.4th 938; however, the reason underlying the introduction of this evidence here may have been even more significant than in those cases. Based upon the evidence of which the trial court was aware when it made its ruling, it was apparent that this case involved a gang fight and shooting resulting from an earlier altercation, the gang-related need for respect and the gang-related means of earning respect—engaging in public acts of violence.

In denying the bifurcation motion, the court appropriately relied on statements of witnesses and the testimony at the preliminary hearing. This evidence demonstrated that a predominant color worn by the Garcia group was red, and that, during the incident, those individuals invoked the terms "Gardenland" and "Norte," and also referred to "mob shit." The court determined that the gang enhancement should not be bifurcated "based on the offer of proof as to all the evidence that will be presented in the trial."

We conclude that the trial court did not abuse its discretion in denying the motion to bifurcate. Independent of the gang enhancement allegation, much of the subject evidence was relevant, among other things, to defendants' motives and specific intent. (See *Hernandez, supra*, 33 Cal.4th at p. 1049.) Like the defendant in *Hernandez*, defendants here injected their gang involvement into this case when they arrived at Eleanor Avenue as a group wearing red and announced who they were. (See *id*. at pp. 1050-1051). With the exception of the evidence relevant to the predicate offenses, the gang evidence was highly probative on these matters and inextricably intertwined

with the underlying charges. (See generally *id.* at p. 1048.) For example, Sample testified at the preliminary hearing about various aspects of gang culture, including the role of respect, guns, and the obligations of gang members to maintain the reputation of their gang. He testified that, "[r]espect is very important in gang culture. They live and die by respect." It is common for gang members to carry and use guns. Carrying guns is a way to gain respect through intimidation. Gang members cannot be perceived as weak; if a gang member is perceived as weak, that lowers the member's standing and endangers him or her. By showing up and rising to the challenge here, the gang enhanced its reputation as "strong and ruthless." If the gang members did not show up, they would have been perceived as weak within the gang culture and not to be trusted or counted on.

This testimony was part of the evidence that was before the court when it ruled on the motion and was relevant at trial to show why the Garcia group went to Eleanor Avenue after the initial confrontation and their subsequent flight to a place of safety, what their intent and motive were in going to Eleanor Avenue, and to explain their conduct upon their arrival. The proffered gang evidence would prove not just the motive and mens rea of the shooter, but also served to establish aiding and abetting by the other defendants of the charged crime and the target crime related to the prosecution's natural and probable consequences theory as well as the foreseeability of the shooting. (See *People v. Pettie* (2017) 16 Cal.App.5th 23, 44-46 (*Pettie*) [bifurcation was properly denied where the evidence of gang membership was probative to show the defendants' motive where the gang expert testified that gang members are obligated to participate in assaults on behalf of fellow gang members; the evidence also supported the prosecution's theory that defendants were acting in furtherance of a conspiracy and were liable for the natural and probable consequences thereof].) The gang evidence here also tended to negate any claims of self-defense and imperfect self-defense; it also tended to negate a claim of heat of passion. Thus, much of the evidence the prosecutor intended to offer to prove the substantive charges and firearms enhancement allegations was the same

evidence it intended to introduce on the gang enhancement allegations. As the prosecution asserted, much of the evidence would have been admissible under Evidence Code section 1101, subdivision (b),[11] even if the gang enhancement had not been alleged. We agree. As we have noted, " ' "because a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." ' " (*Franklin, supra*, 248 Cal.App.4th at p. 953.)

Moreover, considered against the context of the entirety of the evidence to be admitted in the case, any evidence admitted solely to prove the gang enhancement "was not so minimally probative on the charged offense, and so inflammatory in comparison, that it threatened to sway the jury to convict regardless of defendants' actual guilt." (*Hernandez, supra*, 33 Cal.4th at p. 1051.) The predicate offenses as described by the gang expert were no more inflammatory than the charged offense. Nor was there any danger of confusion with collateral issues, and they were not offenses for which any defendant escaped punishment. (*Id.* at p. 1050.)

Thus, we conclude that defendants failed to carry their burden " 'to clearly establish that there [was] a *substantial danger of prejudice* requiring that the charges be separately tried.' " (*Hernandez, supra*, 33 Cal.4th at p. 1051.)

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[11] Evidence Code section 1101, subdivision (b), provides that, notwithstanding the general bar prohibiting the admission of character evidence, evidence that a person "committed a crime, civil wrong, or other act" is admissible for a noncharacter purpose, such as establishing motive, intent, plan, or identity. (See *People v. Williams* (1997) 16 Cal.4th 153, 193 [in a gang-related case, gang evidence is admissible to prove motive and identity under Evid. Code, § 1101, subd. (b)].) Such evidence is also admissible under section 1101, subdivision (b), to link crime participants together and establish the relationship with one another. (*People v. Champion* (1995) 9 Cal.4th 879, 922-923.)

2. Hector's Prior Conviction as a Predicate Offense

As for Hector's contention concerning the use of his prior carjacking conviction as a predicate offense, we note that "Evidence Code section 352 requires the exclusion of evidence only when its probative value is *substantially* outweighed by its prejudicial effect. 'Evidence is substantially more prejudicial than probative . . . [only] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." ' " (*People v. Tran* (2011) 51 Cal.4th 1040, 1047 (*Tran*).) The trial court did not abuse its discretion in impliedly concluding there was no such risk here. As our high court in *Tran* held, "a predicate offense may be established by evidence of an offense the defendant committed on a separate occasion. Further, that the prosecution may have the ability to develop evidence of predicate offenses committed by other gang members does not require exclusion of evidence of a defendant's own separate offense to show a pattern of criminal gang activity." (*Id.* at p. 1044.) The *Tran* court's observation may now be even more significant in light of our high court's more recent opinion in *Prunty, supra,* 62 Cal.4th 59, which we discuss in detail, *post.* Because of the proof *Prunty* requires to establish predicate offenses committed by members of other gang subsets, *Prunty*, in effect, has enhanced the probative value of predicate offenses committed by charged defendants.

Finally, the record demonstrates that, at the time the trial court exercised its discretion in denying bifurcation, it knew it would give a limiting instruction to the jury. Ultimately, the court instructed with CALCRIM No. 1403: "You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose and knowledge that are required to prove the gang-related crimes and enhancements, or, two, the defendant the [*sic*][12] a motive to commit the crimes charged,

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12 As given in writing to the jury, CALCRIM No. 1403 actually reads, in relevant part: "the defendant *had* a motive to commit the crimes charged . . . ." (Italics added.) Either

or, three, the defendant actually believed in the need to defend himself or others, or the defendant acted in the heat of passion. You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied upon by an expert witness in reaching his or her opinion. [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime."

We conclude that the trial court did not abuse its discretion in denying the motion to bifurcate.

E. Due Process Analysis

As we have said, the determination that the trial court did not abuse its discretion in denying the motion to bifurcate does not end the analysis. Even where the trial court does not abuse its discretion in denying bifurcation pretrial, we must reverse if the defendant shows the failure to do so resulted in a "gross unfairness" amounting to a denial of due process. (*Franklin, supra*, 248 Cal.App.4th at pp. 952-953; *Burch, supra*, 148 Cal.App.4th at p. 867.) "In determining whether there was such gross unfairness, we view the case as it was tried, including a review of the evidence actually introduced in the trial." (*Ybarra, supra*, 245 Cal.App.4th at p. 1434 [severance].) "Defendant has the burden to establish gross unfairness, a burden our Supreme Court has characterized as a

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the trial court misspoke, or the word "the" was erroneously substituted for the word "had" when the oral instruction was transcribed. In either case, this trivial error is of no moment. "We of course presume 'that jurors understand and follow the court's instructions.' " (*People v. Wilson* (2008) 44 Cal.4th 758, 803.) "This presumption includes the written instructions." (*Ibid*.) " 'To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control.' " (*People v. Mills* (2010) 48 Cal.4th 158, 201.) Because the jury was given the correctly worded instruction in written form [minute order discussing response to jury request and referencing the jury instruction packet provided to the jurors]), and because, on appeal, we give precedence to the written instructions (*ibid*.), we disregard this trivial error, not raised by any party, as inconsequential.

'high burden' " in the context of severance. (*Id*. at p. 1438, citing *People v. Soper* (2009) 45 Cal.4th 759, 783.) In the severance context, "[t]o establish gross unfairness amounting to a due process violation, a defendant must demonstrate a 'reasonable probability' that the joinder affected the jury's verdicts." (*Ybarra*, at p. 1438, citing *Merriman, supra*, 60 Cal.4th at p. 49 [severance], and *People v. Grant* (2003) 113 Cal.App.4th 579, 588 [severance].) We conclude the same is required in the context of bifurcation of gang enhancement allegations.

Edward completely ignores the due process/gross unfairness part of the analysis. In the only contention arguably addressing whether the refusal to bifurcate resulted in "gross unfairness" amounting to a due process violation, Hector asserts that the denial of the motion to bifurcate and admission of his prior conviction deprived him of his due process right to a fair trial under the reasoning in *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 (*McKinney*), superseded by statute as recognized in *Torres v. Barnes* (N.D.Cal. Sept. 18, 2014, No. C 11-1804 SBA) 2014 U.S. Dist. Lexis 132081, *28-29, 2014 WL 4652400, *9, and *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*). We disagree.

In *McKinney*, the murder victim's throat was slit, and according to the medical examiner, the murder weapon could have been almost any kind of knife. (*McKinney, supra*, 993 F.2d at p. 1381.) At issue in *McKinney* was evidence that the defendant had possessed a particular knife in the past (a "knife that was indisputably no longer in [the defendant's] possession" on the date of the crime); that, on occasion, he strapped a knife to his body while wearing camouflage pants; that the defendant was proud of his knife collection; and that he had carved "Death is His" on a closet door in his dormitory room with a knife. (*Id*. at p. 1382.) Additionally, on cross-examination, the prosecution questioned the defendant "about his 'fascination' with knives, and about whether he enjoyed looking at, talking about, and possessing knives." (*Ibid*.) The Ninth Circuit Court of Appeals noted, "[p]reviously we have held that '[o]nly if there are *no*

permissible inferences the jury may draw from the evidence can its admission violate due process," and concluded that there were "*no* permissible inferences the jury could have drawn" from the character evidence at issue in *McKinney*. (*Id*. at p. 1384, quoting *Jammal v Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920 (*Jammal*), *italics added*.) Moreover, the evidence was "emotionally charged," helping to "paint a picture of a young man with a fascination with knives" and serving "only to prey on the emotions of the jury." (*McKinney*, at p. 1385.) Consequently, the court held that admission of this evidence so infused the defendant's trial with irrelevant prejudicial evidence as to render it fundamentally unfair. (*Id*. at p. 1386.)

McKinney does not help defendants because the evidence in that case was not relevant to prove a fact of consequence and was only relevant to prove character. (*McKinney*, *supra*, 993 F.2d at pp. 1382-1383.) No other permissible inference could be drawn from the evidence, and thus due process was violated. (*Id.* at p. 1384.) *McKinney* has no application when the challenged evidence is relevant to a charged offense or enhancement. Here, the existence of a predicate offense and the primary activities of the gang, of which Hector's prior conviction was an example, were elements of the charged gang and firearm enhancements. Thus, the evidence tended to prove material issues in the case. Furthermore, it does not appear from the opinion that the trial court in *McKinney* gave a limiting instruction expressly warning the jury that it "may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime" (CALCRIM No. 1403) or any similar instruction. Had such an instruction been given, it almost certainly would have been mentioned in the opinion.

Hector also relies on *Albarran*, *supra*, 149 Cal.App.4th 214. In *Albarran*, the defendant was charged with various crimes for his involvement in a shooting at an inhabited dwelling and his flight therefrom, and a gang enhancement was alleged. (*Id*. at p. 219.) Bifurcation was not requested; rather, prior to trial, the defendant sought to

exclude gang evidence, contending that it was irrelevant and otherwise inadmissible under Evidence Code section 352. (*Albarran*, at p. 217.) After an Evidence Code section 402 hearing, the trial court ruled that the evidence was admissible to prove intent and motive. (*Albarran*, at p. 217.) However, at the hearing, the prosecution's gang expert testified he did not know the exact reason for the shooting. (*Id*. at pp. 220, 227.) At trial the expert conceded that there was no evidence the shooters made their presence or purpose known during the shooting; they made no announcements and did not throw any gang signs. (*Id*. at pp. 221, 227.) The defendant's jury found him guilty and he moved for a new trial, asserting that the prosecution failed to prove the gang allegations and that the admission of irrelevant and prejudicial gang evidence warranted a new trial on the underlying charges. (*Id*. at pp. 217, 222.) The trial court granted the new trial motion as to the gang allegations, but denied it as to the underlying charges, ruling that the evidence was relevant to intent and motive. (*Id*. at pp. 217, 225, 226-227.) On appeal, the *Albarran* court held that the defendant was entitled to a new trial on the underlying charges because the gang evidence was not relevant and the prosecution failed to present sufficient evidence that the crimes were gang motivated. (*Id*. at p. 217.) The court observed that, as a matter of state evidence law, " '[g]ang evidence should not be admitted at trial where its *sole relevance* is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense.' " (*Id*. at p. 223, quoting *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449, italics added.) " 'Only if there are *no permissible inferences* the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citation.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.' " (*Albarran*, at p. 229, quoting *Jammal, supra*, 926 F.2d at p. 920, italics added.)

The *Albarran* court concluded the evidence did not support the gang expert's testimony that the shooting was motivated by an effort to gain respect for the gang.

(*Albarran, supra,* 149 Cal.App.4th at p. 227.) There were "no signs of gang members' efforts in that regard—there was no evidence the shooters announced their presence or purpose—before, during or after the shooting. There was no evidence presented that any gang members had 'bragged' about their involvement or created graffiti and took credit for it. In fact, at the [Evidence Code] section 402 hearing [the gang expert] conceded he did not know the reason for the shooting . . . . There is *nothing inherent in the facts of the shooting to suggest any specific gang motive*." (*Albarran*, at p. 227, fn. omitted., italics added.) Given the prosecution's failure to prove the gang evidence had any bearing on the issues of intent or motive, the court "discern[ed] '*no permissible inferences*' that could be drawn" from some of the gang evidence.[13] (*Id*. at p. 230, italics added.) The court concluded that the case "present[ed] one of those *rare and unusual* occasions where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair." (*Id*. at p. 232, italics added.)

Unlike in *Albarran*, where the prosecution's gang expert did not know the reason for the shooting and the prosecution failed to present sufficient evidence establishing that the charged crimes were gang motivated (*Albarran, supra,* 149 Cal.App.4th at pp. 217, 220), here there was evidence of gang name announcements as well as the flashing of gang signs just before the shooting. Additionally, the color red was on display. Also, in contrast to *Albarran*, there was an earlier altercation that was the basis for concluding

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[13] The *Albarran* court's due process violation analysis focused on a "panoply" of "highly inflammatory evidence," including a wide variety of crimes the defendant's gang had committed and numerous acts between other gang members and the police, a threat the gang had made to kill police officers, and numerous references to the Mexican Mafia. (*Albarran, supra,* 149 Cal.App.4th at pp. 217, 227-228, 230.) The court reasoned, "[e]vidence of [the defendant's] gang involvement, standing alone, was sufficient proof of gang motive. Evidence of threats to kill police officers, descriptions of the criminal activities of other gang members, and reference to the Mexican Mafia had little or no bearing on any other material issue relating to [the defendant's] guilt on the charged crimes . . . ." (*Id*. at p. 228.)

that Varrio Gardenland had been disrespected and sought to vindicate that affront. Consequently, unlike in *Albarran* where there was "nothing inherent in the facts of the shooting to suggest any specific gang motive" (*Id*. at p. 227, fn. omitted), the prior altercation, the defendants' gang membership, the gang culture of vindicating disrespect and the act of going to confront the victims' group was strong evidence showing a gang motivation. Also, as we have discussed *ante*, in addition to proving motive, most of the gang evidence was relevant to prove defendants' specific intent, aiding and abetting, and foreseeability of the shooting, and negating self-defense, imperfect self-defense, and heat of passion. (See *Pettie, supra*, 16 Cal.App.5th at p. 46 [gang evidence was "highly probative to their motive for mounting the assault, their state of mind as to the consequences of the assault, and the possibility of bias in the testimony of three reluctant witnesses"].) The gang evidence was highly probative on these matters and inextricably intertwined with the underlying charges. (See generally *Hernandez*, *supra*, 33 Cal.4th at p. 1048.) This is not a case where "no permissible inferences" could be drawn from the challenged evidence. (*Albarran*, at p. 229; *McKinney*, *supra*, 993 F.2d at p. 1384.)

Even the predicate offense related to Hector had *some* relevance as to the underlying charges in addition to the relevance it had as to the enhancements. Sample opined that carjacking was one of the primary activities of the Norteños. Thus, Hector's commission of a primary activity offense of that gang tended to establish his gang membership, which in turn was relevant to motive. And in any event, the testimony concerning the predicate offense was not "emotionally charged," and did not serve "*only* to prey on the emotions of the jury" as in *McKinney*. (*McKinney*, *supra*, 993 F.2d at p. 1385, italics added.) As related by Sample, no firearm was used in Hector's predicate offense, no mention was made about any injuries sustained by the carjacking victim, and the testimony was not otherwise inflammatory.

Importantly, in addition to instructing the jury about the limited purpose of the gang evidence, the trial court admonished the jury: "You may not conclude from this

evidence that the defendant is a person of bad character or that he has a disposition to commit crime." In the absence of any indication that the jury was unwilling or unable to follow the trial court's limiting instructions, it is presumed to have done so. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 196; *Pettie, supra*, 16 Cal.App.5th at p. 45; *Franklin, supra*, 248 Cal.App.4th at p. 953.) There is nothing in the record before us to rebut this presumption. Hector's reliance on *McKinney* and *Albarran* is misplaced.

We conclude that Hector and Edward have failed to meet their "high burden" of establishing "gross unfairness" amounting to a due process violation by showing a "reasonable probability" that the denial of the motion to bifurcate affected the jury's verdicts. (See *Ybarra, supra*, 245 Cal.App.4th at p. 1438.)

II. Gang Expert Testimony—*Crawford* and *Sanchez*

A. Defendants' Contentions

Hector and Edward assert that Sample's gang testimony constituted testimonial hearsay and violated their Sixth Amendment right to confrontation and cross-examination under *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*). These defendants argue that Sample recited testimonial hearsay in describing the predicate offenses, in describing how they were validated as gang members, and in otherwise describing gang activities.[14] While these appeals were pending, the California Supreme

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[14] We will discuss in detail Sample's testimony concerning the predicate offense involving Hector and the validation of defendants as members of the Varrio Gardenland Norteño gang. However, we conclude that defendants' contentions that Sample's testimony about gang history, culture, and primary activities in general constituted inadmissible testimonial hearsay are without merit. This testimony pertained to the sort of background information which is not subject to exclusion on hearsay grounds, to be distinguished from *case-specific* facts relating to the particular events and participants involved in the case about which Sample had no independent knowledge. (*People v. Sanchez* (2016) 63 Cal.4th 665, 685 (*Sanchez*); *People v. Meraz* (2018) 30 Cal.App.5th 768, 781-782, review granted March 27, 2019, S253629 (*Meraz II*); *People v. Blessett*

Court decided *Sanchez, supra*, 63 Cal.4th 665, in which it definitively addressed the admissibility of gang expert opinion basis testimony. We requested supplemental briefing on the issue of whether portions of Sample's testimony, including his testimony concerning the predicate offense involving Hector, constituted case-specific testimonial hearsay within the meaning of *Sanchez*. In supplemental briefing, Alvarez,[15] Hector, and Edward assert that Sample's testimony was derived from street checks, field information cards, police reports, and substantive information relayed to him in conversations with other law enforcement officers, and not based on firsthand knowledge. Thus, his testimony constituted case-specific testimonial hearsay precluded by *Crawford* and *Sanchez*. As to the testimony concerning the predicate offenses, they further assert that this was "case-specific" testimony, because the prosecution was required to prove a "pattern of criminal gang activity," and thus this evidence related to the matters to be proved against these defendants, notwithstanding the fact that, in two of three instances, the predicate offenses did not actually involve these defendants or the charged offenses. They also assert that Sample's opinions as to these defendants' gang membership and contacts were based on information in police reports, field information cards, and street checks.

B. Confrontation Clause, *Crawford,* and *Sanchez*

In *Crawford*, the United States Supreme Court held that the admission of testimonial statements of a witness not appearing at trial violates a defendant's confrontation rights unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Crawford, supra*, 541 U.S. at pp. 53-54.)

(2018) 22 Cal.App.5th 903, 943-945, 947, review granted August 8, 2018 (*Blessett*); *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 408, 413.)

[15] Alvarez did not make a confrontation clause objection in his original briefing. However, since we invited supplemental briefing from him as well as the others, we address his contentions notwithstanding his earlier forfeiture of the issue.

However, the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Id*. at p. 59, fn. 9.) After *Crawford*, California courts relied on a pre-*Crawford* case, *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*), disapproved in *Sanchez, supra*, 63 Cal.4th at page 686, footnote 13, to conclude that "out-of-court statements admitted as basis evidence [are] not admitted for their truth but only to help evaluate the expert's opinion, and for this reason the confrontation clause [does] not apply." (*People v. Hill* (2011)191 Cal.App.4th 1104, 1129 (*Hill*), citing *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209-1210; see also *People v. Valadez* (2013) 220 Cal.App.4th 16, 30; *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426-1427; *People v. Cooper* (2007) 148 Cal.App.4th 731, 746-747.) The *Hill* court was critical of applying *Gardeley*, stating that the California Supreme Court appeared poised to recognize the erroneous reasoning in *Gardeley* and *Thomas*, but concluded it was obligated to do so under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity Sales*). (*Hill*, at pp. 1127-1131 & fn. 18.)

In their opening briefs, Edward and Hector expressly objected on Confrontation Clause grounds, contending that the concurring and dissenting opinions of the United States Supreme Court in *Williams v. Illinois* (2012) 567 U.S. 50 [183 L.Ed.2d 89] (*Williams*) "finally lays to rest the canard that the data underlying an expert opinion is not offered for its truth." They correctly read the legal writing on the wall because, in *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*), following the lead of five United States Supreme Court justices in *Williams*, six of the seven justices of our high court concluded that statements admitted to explain an expert's opinion are admitted for their truth. (See *Dungo*, at pp. 627 (conc. opn. of Werdegar, J.), 635, fn. 3 (dis. opn. of Corrigan, J.).) Also, in *People v. Lopez* (2012) 55 Cal.4th 569, 584, our high court concluded that it was "undisputed" that an out-of-court statement in the form of a notation on a lab report was "admitted for the truth."

Subsequently, the California Supreme Court definitively addressed the admissibility of gang expert opinion basis testimony in *Sanchez, supra*, 63 Cal.4th 665, disapproving of *Gardeley* to the extent *Gardeley* suggested that an expert may properly testify regarding case-specific out-of-court statements when applicable hearsay rules have not been satisfied. (*Id.* at p. 686, fn. 13.) In *Sanchez*, our high court also considered "the degree to which the *Crawford* rule limits an expert witness from relating case-specific hearsay content in explaining the basis for his opinion." (*Id.* at p. 670.) The *Sanchez* court further held that some of the gang expert's "hearsay statements were also testimonial and therefore should have been excluded under *Crawford*." (*Id.* at pp. 670-671.) Our high court "adopt[ed] the following rule: When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id.* at p. 686, fn. omitted.) In adopting this rule, the *Sanchez* court disapproved of its pre-*Crawford* decisions which held that the matters upon which an expert relied as the bases of the expert's opinion were not offered for their truth, and rejected the notion that a limiting instruction coupled with an Evidence Code section 352 balancing analysis was sufficient to allay hearsay and confrontation clause concerns. (*Sanchez*, at p. 686, fn. 13.)

According to our high court, its opinion in *Sanchez* "restore[d] the traditional distinction between an expert's testimony regarding *background information* and *case-specific facts*." (*Sanchez, supra*, 63 Cal.4th at p. 685, italics added.) The crucial distinction is between an expert's testimony concerning his or her general knowledge which is not subject to exclusion on hearsay grounds on one hand, and, on the other, what

it denominated "*case-specific* facts about which the expert has no independent knowledge." (*Id*. at p. 676.) "Case-specific facts are those *relating to the particular events and participants* alleged to have been involved in the case being tried." (*Ibid*., italics added.)

The *Sanchez* court identified a two-step inquiry to address expert witness basis testimony consisting of case-specific facts in criminal cases. "The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is testimonial hearsay, as the high court defines that term." (*Sanchez, supra*, 63 Cal.4th at p. 680.)

C. Analysis

Here, Sample provided a great deal of background testimony pertaining to his general knowledge as an expert concerning Sacramento Hispanic criminal street gangs, their organization, structure, practices, and activities. However, we conclude that he also provided much testimony which, under *Sanchez*, constitutes case-specific testimonial hearsay.

1. Predicate Offense Involving Hector

As noted, the *Sanchez* court defined case-specific facts as "those relating to the particular events *and participants alleged to have been involved in the case being tried*." (*Sanchez, supra*, 63 Cal.4th at p. 676, italics added.) Given this definition, statements

concerning predicate offenses *involving a charged defendant* are case-specific.[16] Thus, we regard Sample's testimony related to the facts underlying the predicate offense committed by Hector as containing case-specific facts. This testimony was based on Sample's review of the police report generated in connection with that case. Sample had no firsthand knowledge of this incident, but rather he based his testimony on out-of-court statements made by one or more other police officers who did not testify in court. Thus, because this testimony consisted of out-of-court statements offered for the truth of the matter asserted, it was hearsay. (Evid. Code, § 1200.) There was no showing that any exception to the hearsay rule applied. Further, there was no showing of unavailability or that Hector, or any of the defendants, had a prior opportunity for cross-examination, or forfeited that right by wrongdoing. (See *Sanchez*, at p. 686.) Therefore, we proceed to the second step of the two-step inquiry described in *Sanchez* and consider whether the content of Sample's testimony constituted *testimonial* hearsay. (*Id.* at p. 680.)

The United States Supreme Court has not provided a clear definition of "testimonial." (*People v. Leon* (2015) 61 Cal.4th 569, 603 (*Leon*).) However, our high court has "discerned two requirements. First, 'the out-of-court statement must have been made with some degree of formality or solemnity.' [Citation.] Second, the primary purpose of the statement must 'pertain[] in some fashion to a criminal prosecution.' " (*Ibid.*; accord, *Dungo, supra*, 55 Cal.4th at p. 619 [referring to the formality and primary purpose criteria as "critical components" instead of "requirements"].) "When the People offer statements about a completed crime, made to an investigating officer by a nontestifying witness, *Crawford* teaches those hearsay statements are generally testimonial unless they are made in the context of an ongoing emergency . . . , or for

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[16] However, the certified record of Hector's conviction was properly received under an exception to the hearsay rule in Evidence Code section 452.5. Having been made for purposes other than as evidence in a prosecution, those records are not testimonial.

some primary purpose other than preserving facts for use at trial." (*Sanchez, supra*, 63 Cal.4th at pp. 694-695.) Formal police reports may be made with the requisite degree of formality or solemnity. (*Ibid.*)

Here, there is no showing that the hearsay statements concerning the underlying facts of Hector's prior conviction as related to the jury by Sample were originally made in the context of an ongoing emergency, or for some purpose other than preserving facts for a subsequent prosecution. (See generally *Sanchez, supra*, 63 Cal.4th at pp. 694-695.) Instead, this testimony appears to have consisted of the sort of case-specific facts about which the expert witness had no independent knowledge that were at the core of *Sanchez*. (*Id*. at p. 676.) These statements came from police reports concerning the carjacking investigation and thus they clearly "pertained in some fashion to a criminal prosecution." (*Leon, supra*, 61 Cal.4th at p. 603.) Therefore, on this record, the evidence pertaining to the underlying facts of the predicate offense involving Hector constituted testimonial hearsay.

Therefore, we conclude that, as to this particular testimony, defendants' confrontation clause rights were violated, and it was error for the trial court to admit this testimony.[17] We discuss whether this violation resulted in prejudice *post*.

2. Validation of Defendants as Varrio Gardenland Norteños

Sample testified extensively about the validation of defendants as Varrio Gardenland Norteño members. While some of the matters to which Sample testified, such as analyzing tattoos and photographs of individuals throwing up gang signs are not testimonial hearsay, the same cannot be said of Sample's testimony concerning defendants' participation in gang crimes and gang-related activities, law enforcement

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[17] We need not address Sample's testimony concerning the predicate offenses committed by the Oak Park Norteños and the West NIK Norteños, because as we discuss *post*, the People no longer rely on those predicate offenses.

contacts, and prior occasions when they were present with gang members. It is these latter matters upon which we shall focus here.

Sample testified that Edward had been validated based on gang tattoos, gang clothing, self-admission to being a gang member, gang crimes, gang-related activities, and associating with validated gang members. He testified that, "[o]n multiple occasions [Edward has] been contacted with validated gang members." He further testified that Edward "was arrested" in 2000. In 2004, "Edward was contacted in a stolen car with a validated gang member named Ronald Bencomo . . . ." Next, Edward and two associates "were all contacted, and at the time the officers documented their gang involvement, they also documented some gang tattoos that Edward had, as well as his admission to being a Varrio Gardenland Norteno." Sample testified that, "Edward admitted gang membership as a Gardenland Norteno *to the officer that contacted him on that day*." (Italics added.) In 2007, "Edward was contacted with a validated Norteno, Julian Lopez."

Sample testified that Hector had been validated based on his self-admission of Varrio Gardenland Norteño membership, gang tattoos, gang clothing, the predicate offense in which he was involved, discussed *ante*, another arrest at which time he was with another Norteño gang member, and the charged crimes. Regarding the instance when Hector allegedly admitted being a Varrio Gardenland Norteño, Sample testified: "He was contacted on American Avenue, and *they* ended up documenting his gang tattoos, some gang clothing *that they had documented*, as well as him being -- admitting to being a Varrio Gardenland member since age seven." (Italics added.) Sample also testified that, on March 24, 2007, Hector "was arrested with another Norteno gang member for selling marijuana or marijuana sales, and that validated gang member was Alfonso Hernandez."

Sample testified that Alvarez had not been validated prior to the shooting, but that he could validate him as of the time of trial. In addition to Alvarez's association with validated gang members in this case, Sample relied upon a gang photograph and gang

graffiti on highway signs discovered at Alvarez's residence during the execution of a search warrant. Sample also relied upon information that Alvarez "was named as a member of Varrio Gardenland by a validated Varrio Gardenland gang member."

As for the validation of Ballesteros, in addition to his involvement in this case, Sample based his opinion on Ballesteros's previous contacts with validated Norteño gang members. He testified that Ballesteros "was contacted in Gardenland Park" in 2005 "with validated Varrio Gardenland Norteno Sal Rabago." Sample continued: "A second contact with Mr. Ballesteros happened on January 1st, 2006, and he was with self-admitted Norteno Ruben Baltazar, after [Baltazar] had been struck by a car."

On cross-examination, Sample acknowledged, as a general matter, that, as a basis for his opinions in this case, he reviewed police reports, interviews, and similar materials. It is clear that substantial portions of Sample's testimony constituted hearsay. Based on his review of police reports, interviews, and other materials, he testified concerning numerous out-of-court statements about which he had no firsthand knowledge which were offered for their truth.[18]

Sample's testimony relaying these statements, including those addressing factors that contributed to validating defendants as gang members and defendants' prior contacts with law enforcement, did not fall under any exception to the hearsay rule. Further, there was no showing of unavailability or a prior opportunity for cross-examination or forfeiture.

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[18] We note that at one level, Edward's and Hector's admissions to being Varrio Gardenland Norteño gang members fell under an exception to the hearsay rule and could have been admissible as admissions under Evidence Code, section 1220. However, testimony about these admissions was hearsay because Sample relied on statements of police officers in their reports concerning the admissions Edward and Hector made to them. "[M]ultiple hearsay is admissible for its truth only if each hearsay layer separately meets the requirements of a hearsay exception." (*Arias, supra,* 13 Cal.4th at p. 149; Evid. Code, § 1201.)

Turning then to the second step of the analysis prescribed by *Sanchez*, we ask whether the statements were testimonial. (*Sanchez, supra*, 63 Cal.4th at p. 680.) As discussed in connection with Hector's predicate offense, *ante*, this testimony, based largely on Sample's review of police reports and similar material, was testimonial. (*Id*. at pp. 694-695.) There is no showing that the hearsay statements were originally made in the context of an ongoing emergency, or for some purpose other than preserving facts for a subsequent prosecution. (See generally *id.* at pp. 694-695.) Thus, following the guidance of *Sanchez*, this testimony was case-specific testimonial hearsay the admission of which violated defendants' rights under the confrontation clause.

D. Prejudice

These defendants assert that, in the absence of the improperly admitted case-specific testimonial hearsay, there was insufficient evidence to prove the gang enhancement allegations. Hector and Edward further complain that the vicarious use firearm enhancement allegations (§ 12022.53, subds. (d), (e)) could only apply to them if the gang enhancement allegations (§ 186.22, subd. (b)(1)) were found true as to them. Hector and Edward also assert that the improperly admitted evidence influenced the jury's verdicts convicting them of murder and attempted murder based on the natural and probable consequences doctrine. Since we will reverse the gang enhancements and vicarious firearm use enhancements on *Prunty* grounds, *post*, we need only consider prejudice as to the charges and the natural and probable consequences doctrine.

"Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705] (*Chapman*)." (*People v. Livingston* (2012) 53 Cal.4th 1145, 1159 (*Livingston*); *People v. Geier* (2007) 41 Cal.4th 555, 608 (*Geier*).) Since *Chapman*, our high court has " 'repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.' " (*Geier*, at p. 608.) "The harmless error

inquiry asks: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' " (*Ibid.*; *Livingston*, at p. 1159.) As to the charged offenses and the natural and probable consequences doctrine, we conclude that the admission of those portions of Sample's testimony that violated defendants' confrontation clause rights was harmless beyond a reasonable doubt.

First, as to Alvarez, based on the verdict and firearm enhancement allegation findings, the jury necessarily concluded that he shot and killed Clay with deliberation and premeditation (§§ 187, 189), and that he shot and wounded Motheral and Khan. The evidence supporting the jury's verdict as to Alvarez was compelling. Courts look to evidence of planning, motive and manner of killing as guidelines to assess the sufficiency of evidence establishing deliberate and premeditated murder. (*People v. Sandoval* (2015) 62 Cal.4th 394, 424.) We think it useful to organize our review for prejudice using the same guidelines.

As for planning, the Garcia group arranged to meet Amaro and his companions to fight, with the knowledge that Amaro might be armed with a gun. According to Torres, upon hearing that Amaro might be armed, Alvarez said he was not worried, and that "they ha[d] theirs, too." This was consistent with the testimony that, when asked by Edward if "they're strapped," Hector responded that he was "pretty sure" they were. According to Torres, Alvarez was to drive to the designated location first to be the lookout and "check out the scene." Torres acknowledged having stated in a police interview that Alvarez was "going to be looking out since he ha[d] the protection."

As for motive, the Garcia group went to meet the Amaro group because of the earlier confrontation, Amaro's telephone calls, and the disrespect perceived from the events that had happened that day. As the fighting commenced, some people were yelling, "Gardenland," further demonstrating the motive was to vindicate the earlier slights and to gain respect for their gang. Torres said she saw someone throw up a Gardenland gang sign. In a statement to the police, a witness said she had seen a

Hispanic male throwing up gang signs and heard somebody yell something like "west side." That particular individual had been chased by a person with a knife. Sample testified that "west side" refers to the west side of the canal that divides Gardenland from Del Paso Heights. Gardenland is on the west side. Sample testified at length about respect, something gang members hold dear, and the need to act on any disrespect shown by others. This testimony was background evidence related to gang culture, not made inadmissible by hearsay and confrontation clause rules. (*Blessett, supra*, 22 Cal.App.5th at p. 943; see also *Sanchez, supra*, 63 Cal.4th at p. 685; *Meraz, supra*, 30 Cal.App.5th at pp. 781-782.) Graffiti and a photograph found in Alvarez's home further established Alvarez's gang membership independent of the testimonial hearsay provided by Sample.

As for manner of killing, Alvarez admitted firing the handgun at Clay with the intent to shoot him. He testified: "I'm trying to shoot the guy that I seen running over there." He further admitted that he emptied the clip, shooting until the gun stopped firing. He wounded two other people as well. Witnesses reported hearing between six and 20 or more shots fired. Police discovered 13 .40-caliber cartridge casings at the scene, which were all fired from the same firearm. Clay was shot in the back, suffering a "very devastating" wound as the bullet passed through his kidney, diaphragm, heart, and lung, killing him. The evidence suggested he was either going to the ground or bent over running when he shot. He was lying face down when first responders went to his aid. Motheral was also shot in the back and Khan was shot in the leg. Given the admissible evidence, including the gunshot wounds to the back of two of the victims, the jury rightly rejected Alvarez's defense of others claim.

We conclude, beyond a reasonable doubt, that a reasonable jury would have found Alvarez guilty of first degree murder in the absence of Sample's testimonial hearsay testimony regarding gang validation and Hector's predicate offense that violated the

confrontation clause.[19] (See generally *Chapman, supra*, 386 U.S. at p. 24; *Livingston, supra*, 53 Cal.4th at p. 1159; *Geier, supra*, 41 Cal.4th at p. 608.)

As to Hector and Edward, their liability, premised on aiding and abetting under a natural and probable consequences theory and/or conspiracy under a natural and probable consequences theory, did not depend on any of the objectionable testimony about the gang. As to aider and abettor liability, the jury was required to find that they were guilty of disturbing the peace or battery or assault by means of force likely to produce great bodily injury either as direct perpetrators or as aiders and abettors, that during the commission of one of those crimes, a coparticipant, Alvarez, committed murder or attempted murder, and a reasonable person in their position would have known that murder or attempted murder was a natural and probable consequence of the commission of the target crimes. (CALCRIM No. 403.) As to conspiracy liability, the jury was required to find that these defendants conspired to commit the crime of disturbing the peace, a coconspirator committed murder and/or attempted murder to further the conspiracy, and that murder and/or attempted murder were the natural and probable consequences of the common plan or design of the crime the defendants conspired to commit. (CALCRIM No. 417.) None of these findings depended on the inadmissible testimonial hearsay.

Other admissible evidence established Hector's and Edward's gang membership and gang motivation here and thus supported the aiding and abetting and conspirator theories advanced by the prosecution. Rodriguez testified that both Hector and Edward were members of the Varrio Gardenland gang. Torres testified that Hector was a Gardenland member in 2007 and that he has a tattoo on his neck which says,

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[19] We will conclude in part VIII. of the Discussion, *post*, that the attempted murder convictions must be reversed. Therefore, we need not address prejudice here as to those convictions.

"Gardenland," representing the gang. Edward had a Gardenland tattoo on his arm. Photographs depicting Hector and Edward and other individuals flashing gang signs representing Gardenland were introduced into evidence. As with Alvarez, invocation of their gang's name during the commission of the crime provided further evidence of the gang motivation for their participation. And while they were in Mexico, Hector and Edward told Rodriguez that things were not going to look as bad for him as it would for them "because we gang bang." They were right.

Additionally, as to the natural and probable consequences theory upon which Hector's and Edward's murder convictions were based,[20] the evidence showed that both of them knew Alvarez had a gun. There was expert testimony about what it meant to be "caught slippin" and since Edward asked if "they're strapped," it appears he was concerned that they not be "caught slippin." Knowing or believing they had a gun, both Hector and Edward went to Eleanor Avenue knowing that, at a minimum, there would be a fight, but also assured their group would be prepared for gunplay or could initiate the shooting. As we discuss in further detail, *post*, there was overwhelming evidence establishing that, under all of the circumstances, a reasonable person in defendants' position would have or should have known that a murder was a reasonably foreseeable consequence of the crimes of disturbing the peace, battery and assault they aided and abetted. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 902 (*Covarrubias*) [discussing the natural and probable consequences doctrine]; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1587 (*Woods*) [same].)

Thus, as to the underlying convictions, we conclude that Sample's testimony admitted in violation of these defendants' confrontation clause rights was harmless

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[20] We discuss Senate Bill No. 1437 and murder convictions based on the natural and probable consequences theory in part XI. of the Discussion, *post*.

beyond a reasonable doubt. (See generally *Chapman, supra*, 386 U.S. at p. 24; *Livingston, supra*, 53 Cal.4th at p. 1159; *Geier, supra*, 41 Cal.4th at p. 608.)

Furthermore, the introduction of this evidence was harmless beyond a reasonable doubt with reference to the firearm enhancement allegations. It is undisputed that Alvarez personally used a firearm inflicting great bodily injury and death. (§ 12022.53, subd. (d).) As we discuss in part III. of the Discussion, *post*, we vacate Hector's and Edward's section 12022.53, subdivision (e)(1), vicarious use firearm enhancements based on our conclusion that, applying *Prunty*, *supra*, 62 Cal.4th 59, there is insufficient evidence to support the gang allegations. However, we conclude that the admission of Sample's testimony that violated the confrontation clause was harmless beyond a reasonable doubt as to the true findings on the section 12022, subdivision (a)(1), vicarious arming enhancement allegations asserted and found true against Hector and Edward. Those true findings only required findings that Edward and Hector were principals in the commission of a felony or attempted felony where one or more of the principals were armed with a firearm, regardless of whether they were personally armed with a firearm. (§ 12022, subd. (a)(1).)

III. Gang Enhancement Proof Required by *Prunty*

A. Defendants' Contentions

While these appeals were pending, the California Supreme Court decided *Prunty, supra*, 62 Cal.4th 59. In *Prunty*, our high court was called upon to decide the "showing the prosecution must make when its theory of why a criminal street gang exists turns on the conduct of one or more gang subsets." (*Id*. at p. 67.) Our high court held that "when the prosecution seeks to prove the street gang enhancement by showing a defendant committed a felony to benefit a given gang, but establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets, it must prove a connection between the gang and the subsets." (*Id*. at

pp. 67-68.) For shorthand purposes, we shall refer to this requirement as the *Prunty* connection.

We granted Hector's and Edward's requests to file supplemental briefs addressing the legal sufficiency of the evidence supporting the true findings on the gang enhancements under *Prunty*. Alvarez joined in Hector's and Edward's supplemental briefing on the issue pursuant to California Rules of Court, rule 8.200(a)(5). These defendants assert that the prosecution did not establish a *Prunty* connection and thus the evidence here was legally insufficient to support the true findings on the criminal street gang enhancements. (§ 186.22, subd. (b)(1).) Additionally, Hector and Edward assert that, because the true findings on their vicarious use firearm enhancements (§ 12022.53, subd. (e)(1)) necessarily require a finding that a non-shooter aider and abettor "violated subdivision (b) of Section 186.22," those enhancements also must be struck as to them. Based on *Prunty*, we conclude that the true findings on the gang enhancement allegations under section 186.22, subdivision (b), and the vicarious use firearm enhancements under section 12022.53, subdivision (e)(1), are not supported by legally sufficient evidence and must be struck.

B. Standard of Review

" ' "We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. [Citation.] Thus, we presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence." [Citation.]' [Citation.] 'The question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the elements of the underlying enhancement beyond a reasonable doubt.' " (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1197, disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v.*

Miranda (2016) 2 Cal.App.5th 829, 834 (*Miranda*).) We do not reweigh the evidence or reevaluate witness credibility. (*Ibid.*)

As we have noted, certain evidence offered to prove the gang enhancement allegations here was admitted in violation of *Sanchez, supra*, 63 Cal.4th 665. "Nevertheless, in 'reviewing the sufficiency of the evidence for purposes of deciding whether retrial is permissible, [we] must consider *all* of the evidence presented at trial, including evidence that should not have been admitted.' " (*People v. Lara* (2017) 9 Cal.App.5th 296, 328, fn. 17 (*Lara*), quoting *People v. Story* (2009) 45 Cal.4th 1282, 1296.) As will be seen, even with the evidence admitted in violation of *Sanchez*, the evidence is still insufficient to support the findings on the gang-related enhancements.

C. Criminal Street Gang Enhancements and *Prunty*

To establish that a group is a criminal street gang, the prosecution must prove that: (1) it is an "ongoing *organization, association, or group* of three or more persons, whether formal or informal, having a common name or common identifying sign or symbol"; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal acts; and (3) the group's "members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f); *Prunty, supra*, 62 Cal.4th at p. 71, italics added.) A "pattern of criminal gang activity" is "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more [enumerated predicate offenses] provided at least one of these offenses occurred . . . within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (§186.22, subd. (e).) The requirement of an "organization, association, or group" in the definition of "criminal street gang" set forth in section 186.22, subdivision (f), requires evidence showing an "organizational or associational connection" uniting the "group" members. (*Prunty*, at p. 85.) Thus, our high court in *Prunty* held that "when the prosecution seeks to prove . . . a defendant committed a

felony to benefit a given gang, but establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets, it must prove a connection between the gang and the subsets." (*Id.* at pp. 67-68.)

D. Analysis

We face a different set of circumstances than in *Prunty*. While the prosecution offered three predicate offenses, one of the predicate offenses involved Varrio Gardenland Norteños—Hector's conviction for carjacking. Additionally, it is well-settled that the charged offenses can serve as one of the two required predicate offenses. (*Tran, supra*, 51 Cal.4th at p. 1046; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1383; *Gardeley, supra*, 14 Cal.4th at p. 625; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1400.) Thus, where the prosecution in *Prunty* relied on predicate offenses involving two other subsets (*Prunty, supra*, 62 Cal.4th at p. 82), the evidence here showed that Varrio Gardenland committed the requisite two predicate offenses and there is no need to consider the horizontal relationship, if any, between Varrio Gardenland and the other two subsets, or the vertical relationship of those other two subsets to the Norteño gang. In light of the prosecution's theory of the case, discussed immediately *post*, we need only focus on whether there is substantial evidence of a vertical associational or organizational connection between Varrio Gardenland and the umbrella Norteño criminal street gang.

1. The Prosecution's Gang Theory

We first note that the prosecution did not advance the theory that Varrio Gardenland was itself a criminal street gang and that defendants' commission of the charged offenses benefited Varrio Gardenland. If such a theory had been proven, there would be no need to establish a connection to the umbrella Norteño criminal street gang. (See *Prunty, supra*, 62 Cal.4th at p. 80 ["when a defendant commits a crime to benefit a particular subset, and the prosecution can show that the subset in question satisfies the primary activities and predicate offense requirements, there will be no need to link together the activities of various alleged cliques; nor is there likely to be uncertainty

about what the relevant 'criminal street gang' is"]; see also *People v. Tovar* (2017) 10 Cal.App.5th 750, 758 [there was no need to connect the subset to the broader Norteño gang because there was sufficient evidence the defendant conspired to murder the victim for the benefit of the subset].) However, the prosecution offered no evidence establishing the primary activities of Varrio Gardenland and consequently, the evidence here does not support a finding that it is a criminal street gang in and of itself.

The prosecution's theory was that the charged crimes benefitted the Norteño criminal street gang. This theory was set forth in the information[21] and was advanced by the prosecutor throughout the trial, including through the questions the prosecutor asked of Sample and closing argument.

Asked whether facts posed in a hypothetical question reflecting the facts in this case indicated that the shooting would benefit the Norteños, Sample testified that it would. He opined that the shooting would benefit and enhance that group's reputation for violence. He referenced the participants "yelling out their gang," although in the prosecutor's hypothetical (and the trial evidence), the participants were yelling "Gardenland," not "Norteños" or "Norte." Sample testified that the hypothetical scenario would benefit the Norteño gang because "[l]ots of people saw what happened. Lots of people heard what happened, and they know who is responsible for it" because "[t]hey are yelling out their set" and wearing identifying colors. Sample further testified that, even if one of the members of the group they went to fight was also a Norteño, this would benefit the Norteños who did the shooting as well as the Norteño gang in general because

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[21] The gang enhancement allegation in the information reads: "It is further alleged that the defendants . . . committed the above offense for the benefit of, at the direction of, and in association with a criminal street gang, to wit, NORTEÑOS, with the specific intent to promote, further and assist in criminal conduct by gang members, pursuant to Penal Code Section 186.22(b)(1)."

it enhances their reputations for violence. However, according to Sample, the group that commits the shooting would earn an even more extreme reputation for violence.

Sample testified that Norteños identify with the color red and any representation of the letter "N." Also, because "N" is the fourteenth letter of the alphabet, the number 14 is another Norteño symbol, often represented by a one and a four, by one dot and four dots, or by the roman numerals XIV. Sample estimated that there are approximately 1,500 validated Norteño members in Sacramento. He testified that the Norteños arose from the Nuestra Familia prison gang. This testimony was sufficient to satisfy the requirement that the Norteños were a group of three or more persons "having a common name or common identifying sign or symbol," as is required under section 186.22, subdivision (f).

The Norteños' primary activities, according to Sample, included the commission of one or more of the statutorily enumerated acts, including murder, shootings, shootings into inhabited dwellings, carrying and possessing weapons and handguns, narcotics sales, car theft, and carjacking. (See § 186.22, subd. (f) [defining "primary activities"].) This testimony was sufficient to satisfy the primary activity requirement as to the Norteños. (See *Prunty, supra*, 62 Cal.4th at p. 82.)

2. The *Prunty* Connection Requirement

We now turn to a requirement found lacking in *Prunty*: whether there was "an associational or organizational connection between the . . . alleged Norteño subset that committed the requisite predicate offenses," here Varrio Gardenland Norteños, "and the larger Norteño gang that" the charged crimes were alleged to benefit. (*Prunty, supra*, 62 Cal.4th at p. 81.)

Our high court noted that the requisite associational or organizational connection uniting subsets and the umbrella gang can be proved by various types of evidence, but did not dictate a particular type of evidence to satisfy the required showing. The court provided general and specific examples of evidence that might establish the requisite associational or organizational connection in a case involving multiple subsets. Several

of these examples are suggestive of proof that could also establish a vertical connection between a subset and an umbrella gang, and include the following: (1) evidence of "collaboration or organization, or the sharing of material information"; (2) "the prosecution may show that … subset members exhibit behavior showing their self-identification with a larger group"—"behavior demonstrating a shared identity with" a larger organization; (3) the subset is "controlled by the same locus or hub," e.g. the subset "contains a 'shot caller' who 'answers to a higher authority' in the Norteño chain of command"; (4) the activities of the subset "benefit the same (presumably higher ranking) individual or group," e.g. sharing drug sale proceeds with the umbrella group or an associated prison gang; (5) governance by the same bylaws; and (6) the subset employs the "same initiation activities." (*Prunty, supra*, 62 Cal.4th at pp. 71, 73-74, 77-80.)

The *Prunty* court was careful to note that the words "formal or informal" in section 186.22, subdivision (f), suggest that "the prosecution need not show that the relationship between subsets and a larger organization resembles, for example, the stereotypical organized crime syndicate's hierarchical, tightly organized framework." (*Prunty, supra*, 62 Cal.4th at p. 73.) But "it is not enough . . . that the group simply shares a common name, common identifying symbols, and a common enemy." (*Id*. at p. 72.) The "group must be united by more than shared colors, names, and other symbols." (*Id*. at p. 74.) Furthermore, ideological commonalities are insufficient in and of themselves. "Shared ideology is a poor proxy for whether a group in fact exists." (*Id*. at p. 75.) Nor is the fact that the subset engages in similar conduct sufficient without demonstrating that the subset is somehow connected to the larger group. (*Id*. at p. 72.) The prosecution's evidence must "allow the jury to reasonably infer that the 'criminal street gang' the defendant sought to benefit—or which directed or associated with the defendant—included the 'group' that committed the primary activities and predicate offenses." (*Id*. at p. 76.)

Sample testified in general terms that a Norteño gang member is a Norteño "first." Specifically, the prosecutor asked, "In terms of being Norteño and being a subset, are you a Norteño first?" Sample responded, "Yes. [¶] Again, the subset -- the Norteño is a big umbrella, if you will, and subsets are just underneath. That's why there are many Norteño subsets." This testimony was potentially helpful to establishing a *Prunty* connection, but it fell short. Sample did not testify that Varrio Gardenland adopted the Norteño-first philosophy. Indeed, the exact nature of the philosophy was not clear. What exactly did it mean to be a "Norteño first?" Sample's testimony on this point was not nearly as detailed as it was in *People v. Vasquez* (2016) 247 Cal.App.4th 909 (*Vasquez*), where this court reasoned that similar, more detailed testimony was one of several considerations establishing a *Prunty* connection between subsets. (*Id.* at p. 926.) There, "Sample testified that even though Norteno gang members may belong to different sets or subsets, *their 'foremost allegiance* is to the Nortenos gang, aside from their set or subset.' " (*Ibid*., italics added.)

Sample testified here that Varrio Gardenland Norteños was a subset of the Norteño gang consisting of between 50 and 60 members. He further testified that, "Varrio Gardenland is a subset, a smaller group of Nortenos who associate themselves to a specific area in Sacramento, in a specific neighborhood." However, the connection to the Norteño criminal street gang implicit in his labeling of Varrio Gardenland as Norteños or a Norteño subset was merely conclusory. (See *People v. Ramirez* (2016) 244 Cal.App.4th 800, 815 [gang expert testimony merely characterizing subsets as "aligned" with the Sureños was insufficient to connect the subsets that committed the predicate offenses to the Sureños].) There was no evidence Varrio Gardenland was "controlled by the same locus or hub." (*Prunty*, *supra*, 62 Cal.4th at p. 77.) There was no evidence of collaboration or organization, or the sharing of material information between Varrio Gardenland and the umbrella Norteño gang. Nor was there evidence that Varrio Gardenland activities benefited the Norteños (or Nuestra Familia). While there was

testimony of a general nature about the existence of Norteño subsets under the Norteño umbrella, "*Prunty* requires that the prosecution, in a case involving Norteños and testimony that Norteños operate through subsets, introduce evidence specific to the subsets at issue." (*People v. Nicholes* (2016) 246 Cal.App.4th 836, 848 (*Nicholes*).)

Proof that a subset is governed by the same bylaws may suggest it functions, however informally, within a single hierarchical gang. (*Prunty, supra*, 62 Cal.4th at p. 77.) However, the evidence here concerning bylaws or constitutions suggested that subsets may, in fact, be autonomous. Sample testified that he had seen the "14 bonds" before, and that he "ha[d] them in [his] office." Asked further if the 14 bonds was "the basic constitution of the Nortenos in prison," Sample testified: "*I have seen multiple constitutions . . . for Nortenos, depending upon which clique you're talking about*." (Italics added.) Without further explanation, this testimony actually undermines, or, at the least, does not reinforce, the notion of an associational or organizational connection between the Norteños and subsets. It suggests that certain cliques or subsets are governed by their own rules. Sample did not testify that he had seen any constitutions, bylaws, bonds, training curriculum, or similar documents governing Varrio Gardenland or connecting that subset to the Norteños. (Cf., *Miranda, supra*, 2 Cal.App.5th at p. 842 [Southside gang members in jail consisting of gang members from local street gangs were governed by a set of rules called "the Southside rules"]; *People v. Ewing* (2016) 244 Cal.App.4th 359, 367 [testimony by gang expert concerning the "regimental rules," setting forth the rules and expectations for Norteño criminal street gangs.]; *Vasquez, supra*, 247 Cal.App.4th at p. 918 [jail "kite" intercepted containing information about Norteño "curriculum" including a structured training process for the gang].) Nor was there any other evidence that Varrio Gardenland was governed by any bylaws, constitution, bonds, or rules that it adopted from the umbrella Norteño gang; for example, there was no evidence that the Norteño 14 bonds were discovered in a Varrio Gardenland member's residence.

Likewise, the evidence of initiation activities did not establish a connection to the Norteños. Sample testified some Norteño gangs "jump-in" new members by beating the prospect for 14 seconds to see if they are tough enough to be in the gang. But, as Sample acknowledged, not every Gardenland gang member with whom he had contact had been jumped in. Furthermore, Sample did not testify about whether "jumping-in" was an initiation practice of the umbrella Norteño gang. Savala, on the other hand, testified that Norteños are not initiated by being "jumped-in." Rather, "you got to put work in," or "somebody raises their hand, saying you're a good dude," and then that person is responsible for the initiate, accepting liability if the initiate betrays the gang or does something wrong.

Sample did testify concerning what he called the "commonality" shown by the Varrio Gardenland members with Norteño signs and symbols, such as identifying with the color red and the numbers one and four. However, the *Prunty* court made clear that the gang enhancement requires "evidence that goes beyond proof that three or more persons share a 'common name or common identifying sign or symbol.' " (*Prunty, supra*, 62 Cal.4th at p. 75, quoting § 186.22, subd. (f).) There must, in addition, be an organizational or associational connection. (*Prunty*, at pp. 83-84.) This "commonality" evidence may have "fulfill[ed] the element of section 186.22(f) requiring such common characteristics"; it does not, however, show that Varrio Gardenland is "united together or with a larger group as a single 'organization, association, or group.' " (*Ibid.*)

Asked "how a *gang* is *typically structured*" and to "give us some idea about how street *gangs* are structured," Sample testified that street gangs are organized in a very loose fashion. (Italics added.) There are shot callers or "OG original gangsters" who are typically older members. The "soldiers" or active participants are generally younger, in their teens and twenties. Additionally, there are often younger "wannabe[]s," in the age range of seven to 12 years old, "hanging around with a lot of gang members wearing the gang clothing, because they are watching their other friends in the neighborhood do that

same type of behavior, and they are . . . mimicking their behaviors." However, the record makes clear that this testimony described the structure and organization of street gangs *generally*. It neither specifically addressed the Norteño street gang structure or that of the Varrio Gardenland subset. Furthermore, Sample was not asked to identify any Norteño shot callers or OG's in Varrio Gardenland or opine that there were any among the Varrio Gardenland membership. Thus, Sample's general testimony concerning shot callers in the Norteño hierarchy was insufficient to establish a *Prunty* connection to Varrio Gardenland. (*Nicholes, supra,* 246 Cal.App.4th at p. 847 [general testimony regarding the larger group's hierarchy, including "shot callers," is insufficient where the evidence was not specific to the subset].)

The *Prunty* court suggested that the prosecution may establish the requisite organizational or associational connection by evidence showing "behavior demonstrating a shared identity . . . with a larger organization." (*Prunty, supra,* 62 Cal.4th at p. 73.) Obtaining tattoos and posing for photographs may be such behavior. However, the record contains no evidence that any of defendants have a Norteño-specific tattoo. There were, however, photographs of individuals other than defendants flashing an "N" for Norteño and displaying fingers signifying the number 14 for Norteños. In commenting on one of the photos depicting an individual holding up one finger on one hand and four fingers on the other, Sample testified, "I don't really see how it relates to Gardenland per say. That is more of a Norteño thing." Whatever that testimony means, the *Prunty* court cautioned that, "there are some limits on the boundaries of an identity-based theory. The evidence must demonstrate that an organizational or associational connection exists in fact, not merely that a local subset has represented itself as an affiliate of what the prosecution asserts is a larger organization. [Citation.] Although evidence of self-identification with the larger organization may be relevant, the central question remains whether the groups in fact constitute the same 'criminal street gang.' " (*Id*. at p. 79.) Here, neither the photographs alone nor the photographs in combination with other

evidence establish the required connection. (Cf. *Vasquez, supra*, 247 Cal.App.4th at pp. 924-925 [photographs of different subset members together found on electronic social media showed associations between subsets].) Indeed, according to the trial evidence, when defendants' group made it known who was responsible for the violence on Eleanor Avenue that day, they yelled "Gardenland" and "west side" (a reference to the west side of the canal, where Gardenland is located), not Norte or Norteños. (Cf. *id*. at pp. 911, 925 [defendants shouted Nortes or Norteños during the charged robbery and assault].)

The People now rely on the testimony of Savala, who testified as a gang expert on behalf of Ballesteros. While the People acknowledge that Savala "opined that the gang [defendants] associated with *was not part of the structure he described*," the People further assert that Savala's testimony "tends in part to support Detective Sample's contrary opinion that Gardenland was part of the Norteño street gang." (Italics added.) We do not see how. Savala opined that Gardenland was not a Norteño subset. He also testified that "[t]here is a lot of kids from every neighborhood in Sacramento, they claim Norte. They claim this, they claim that, but they've never actually been -- have ties to the actual criminal organization Nortenos." Moreover, contrary to the People's contention, Savala's testimony did not provide proof of "how the Norteño gang is organized into subsets on the streets." Asked if there were subsets of the Norteño gang, Savala responded by asking, "What do you mean by 'subsets'?" He was then asked if there were, "out on the street associated gangs, associated in the sense they are somehow connected," and specifically if there was "a connection between the actual Norteno gang and, say, Del Paso Heights or Oak Park Nortenos." Savala responded, "There are individuals from *those neighborhoods* . . . that have ties to prison gangs, to Norteno prison gangs." (Italics added.) He did not testify about any such ties between Gardenland and the Norteños or people in the Gardenland neighborhood and the Norteños. Moreover, asked if Oak Park Norteños were indeed Norteños or were merely individuals from Oak Park claiming to be Norteños, Savala responded: "They are just

kids claiming to be Norteno." Thus, Savala's testimony does not help the People's showing. If anything, it undermines it.

Viewing the evidence in the light most favorable to the prosecution, we conclude that the prosecution failed to prove the requisite organizational or associational connection between Varrio Gardenland and the umbrella Norteño criminal street gang. (*Prunty, supra*, 62 Cal.4th at p. 81.) Similar to *Prunty*, "Sample did not describe any evidence tending to show collaboration, association, direct contact, or any other sort of relationship" between Varrio Gardenland and the Norteños.[22] (*Id*. at p. 82.)

We agree with Hector, Edward and Alvarez that the evidence was legally insufficient to support the true findings on the section 186.22, subdivision (b)(1), gang enhancement allegations. "This conclusion is the equivalent of an acquittal. Defendant[s], therefore, may not be retried on the gang enhancement." (*People v. Garcia* (2014) 224 Cal.App.4th 519, 526, citing *People v. Seel* (2004) 34 Cal.4th 535, 545-550; cf. *Lara, supra*, 9 Cal.App.5th at p. 302, fn. 3 [because the evidence admitted by the trial court, despite having been erroneously admitted in violation of, inter alia, *Sanchez*, would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial].) The 10-year sentence imposed as to each count as to each defendant must be struck.[23]

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[22] There may have been a good reason why Sample did not testify at trial about a connection between Varrio Gardenland and the umbrella Norteño gang. When Sample was asked on cross-examination at the preliminary hearing whether Varrio Gardenland reported "to some general Norteño group," Sample responded, "Not to my knowledge." Furthermore, when asked if Varrio Gardenland had any general association with the Norteños other than being Hispanic, Sample merely replied, "Well the colors, the tattoos, those types of associations." Sample testified that "[m]ost people in the Gardenland gang are from that Gardenland neighborhood, and they also associate with the same colors as Nortenos, the same numbers with 14, association with the red."

[23] Alvarez contends that the 10-year sentence imposed pursuant to section 186.22, subdivision (b), should be struck because the 15-year minimum parole provision in

As to Hector and Edward, the true findings on the section 12022.53, subdivision (e)(1), vicarious use firearm enhancements were based on the true findings as to the gang enhancements.[24] Because we have determined that the true findings on the gang enhancements are not supported by legally sufficient evidence, we further conclude that the true findings on the section 12022.53, subdivision (e)(1), vicarious use firearm enhancements as to Hector and Edward must be struck. However, as to Hector and Edward, the jury found true vicarious arming enhancements pursuant to section 12022, subdivision (a)(1), as to each of the three counts. The trial court, in effect, stayed execution of the one-year terms to be imposed for each of these enhancements pursuant to section 1170.1, subdivision (f). Because we are striking the enhancements imposed pursuant to section 12022.53, subdivision (e)(1), as to Hector and Edward, we shall lift the stay on the vicarious arming enhancements under section 12022, subdivision (a)(1) and execute the sentences on those enhancements related to the murder count.

IV. Prosecution's Rebuttal Evidence

A. Defendant's Contentions

Alvarez, Hector, and Edward assert that the trial court erred in admitting D.A. Investigator Trefethen's "gun-placement experiment" in rebuttal. They maintain that whether the gun was between the seat and the center console of Ballesteros's Monte Carlo was not relevant to any material issue in this case. According to these defendants,

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subdivision (b)(5) applies when a defendant is sentenced to a life term and a gang enhancement is found true. This contention is rendered moot by our conclusion that the evidence of the *Prunty* connection is insufficient.

[24] Section 12022.53, subdivision (e)(1), reads: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)." Subsections (b), (c), and (d) set forth the personal use/discharge of a firearm enhancements.

whether Alvarez lied about this matter was a collateral issue. Moreover, as to the conduct of the experiment, they assert that the evidence failed to satisfy the "substantial similarity" test. Additionally, these defendants assert that this evidence should have been excluded pursuant to Evidence Code section 352. We disagree, and conclude that the trial court did not abuse its discretion in admitting this rebuttal evidence.

B. Analysis

"[E]xperimental evidence is admissible only when the party offering it proves (1) that it is relevant; (2) that it was conducted under conditions substantially similar to the original occurrence tested; (3) that presenting the evidence of the experiment will not consume undue time, confuse the issues, or mislead the trier of fact; and (4) that the expert testifying about the experiment is qualified to do so."[25] (*People v. Lucas* (2014) 60 Cal.4th 153, 228 (*Lucas*), disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19; see *People v. Turner* (1994) 8 Cal.4th 137, 198 (*Turner*).) The trial court enjoys broad discretion in deciding whether to admit such evidence. (*People v. Campbell* (1965) 233 Cal.App.2d 38, 44.)

" 'Relevant evidence' means evidence, *including evidence relevant to the credibility of a witness . . . ,* having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210, italics added.) "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

We disagree with the claim that this evidence was not relevant to material issues in this case. Alvarez testified that he did not have a gun, but based on his earlier

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[25] These defendants do not expressly raise any contentions concerning the third and fourth elements of this analysis. Consequently, we need not address these matters.

observations, he knew that there was a gun in the front passenger-side seat of Ballesteros's Monte Carlo, between the seat and the center console. Alvarez maintained that, during the confrontation on Eleanor Avenue, he retrieved the gun, which was not his, from that location where he had noticed it earlier, as a last resort to come to the defense of his friends. Other evidence, however, indicated that Alvarez deliberately brought the gun with him to the encounter. According to Torres, after the group learned that Amaro may be armed, Alvarez stated that he was not worried, and that "they ha[d] theirs, too." Furthermore, Torres acknowledged having told Detective MacLafferty that Alvarez was "going to be looking out since he ha[d] the protection." Simental testified that Alvarez had owned a gun, and that Ballesteros did not have a gun.

We agree with the People that whether Alvarez deliberately brought the gun to the encounter or, as he claimed, found it in the Monte Carlo, was relevant to whether the shooting was murder, manslaughter, or self-defense. It was also relevant to Alvarez's credibility. Notably, Alvarez testified that he never said anything about having a gun or being strapped or anything like that, and he did not hear anyone else say anything to that effect. Thus, the disputed rebuttal evidence was relevant to material issues in the case.

As to the second factor, we agree with the People that the experiment was conducted under conditions *substantially similar* to the actual or original occurrence. (See generally *Lucas, supra*, 60 Cal.4th at p. 228.) The trial court ruled that the make and model of the vehicle used in the experiment were identical to Ballesteros's Monte Carlo.[26] Additionally, the court noted that the handgun used in the experiment was

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[26] The court did not explicitly state that the year of the demonstration vehicle was the same as Ballesteros's vehicle. However, defendants did not assert in the trial court and do not assert on appeal that the demonstration vehicle and Ballesteros's vehicle were of different model years. Additionally, Ballesteros's attorney acknowledged in closing arguments that Ballesteros's car was a 2006 Monte Carlo, which was the same model year as the car used by Trefethen as the demonstration vehicle.

substantially similar to the handgun Alvarez used in the shooting; Trefethen testified that the handgun he used in his experiment, a Glock Model 22, is approximately one-half inch longer than a Glock Model 23. On appeal, these defendants argue that Trefethen failed to ensure that the "seat style, seat configuration, [and] upholstery matched . . ." Ballesteros's Monte Carlo, or to confirm that the demonstration vehicle had factory seats and a factory console. However, there is no requirement that the conditions in the experiment must be absolutely identical to those in the original occurrence. (*Turner, supra*, 8 Cal.4th at p. 198; see *People v. Jones* (2011) 51 Cal.4th 346, 375.)

We conclude that, contrary to these defendants' contentions, the evidence was both relevant to material issues presented at trial, and derived from a procedure implementing conditions substantially similar to the prior occurrence sought to be duplicated. The concerns raised by these defendants on appeal went to the weight to be accorded to the evidence, not its admissibility. "It was both competent and admissible; its weight was for the jury to determine.' " (*Beresford v. Pacific Gas & Electric. Co.* (1955) 45 Cal.2d 738, 749.)

We also reject the assertion that the trial court abused its discretion in admitting the rebuttal evidence because it was unduly prejudicial, confusing, and misleading within the meaning of Evidence Code section 352. "Evidence is not inadmissible under [Evidence Code] section 352 unless the probative value is 'substantially' outweighed by the probability of a 'substantial danger' of undue prejudice or other statutory counterweights. Our high court has emphasized the word 'substantial' in [Evidence Code] section 352. [Citations.] [¶] Trial courts enjoy ' "broad discretion" ' in deciding whether the probability of a substantial danger of prejudice substantially outweighs probative value. [Citations.] A trial court's exercise of discretion 'will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Holford* (2012) 203 Cal.App.4th 155, 167-168.) The rebuttal evidence had significant

probative value, discussed *ante*. Moreover, the probative value of this evidence was not substantially outweighed by the probability of undue consumption of time or that its introduction would create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (See Evid. Code, § 352; *Holford*, at pp. 167-168.)

Alvarez asserts that this evidence was only relevant to the improper purposes of showing that he was prone to violence and to carrying a gun. Alvarez overlooks the relevance of this evidence tending to prove that he brought a gun to the fight with deliberation and premeditation; to prove the role guns play in intimidation, gaining respect and vindicating disrespect in gang culture; and to refute his claim that the gun was not his and was in Ballesteros's car all along.

Accordingly, we conclude that the trial court did not abuse its discretion in permitting the People to present this rebuttal evidence.

V. Natural and Probable Consequences Instruction and *Chiu*

A. Defendants' Initial Contentions

Initially, Hector and Edward asserted that the trial court erroneously instructed the jury on the natural and probable consequences theory of liability, in that it failed to instruct that a lesser degree of homicide may have been a natural and probable consequence of their conduct. They asserted that the level of homicide that is a natural and probable consequence of a defendant's actions may differ from the level of homicide committed by the actual killer. In a footnote in his opening brief, Edward noted that the California Supreme Court granted review in *People v. Chiu*, review granted August 15, 2012, S202724, an unpublished opinion of this court involving jury instructions on the natural and probable consequences doctrine.

B. *People v. Chiu*

While these appeals were pending, our high court decided *Chiu, supra*, 59 Cal.4th 155.[27] In *Chiu*, the California Supreme Court held that "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine." (*Chiu, supra*, 59 Cal.4th at pp. 158-159.) Rather, our high court determined that such a defendant's liability for first degree premeditated murder "must be based on direct aiding and abetting principles." (*Id.* at p. 159.)

C. Post-*Chiu* Contentions

We granted Hector's and Edward's requests to file supplemental briefs addressing *Chiu*. Hector and Edward both assert that, pursuant to *Chiu*, their convictions of first degree deliberate and premeditated murder, premised on the natural and probable consequences doctrine, must be reversed. They contend that there was no evidence, nor was it theorized or argued, that they had any direct liability as aiders and abettors, and they assert that their liability was premised solely on the natural and probable consequences doctrine, whether as aiders and abettors or coconspirators. They also assert that the natural and probable consequences doctrine is applied interchangeably as to aiding and abetting and conspiracy theories of liability, and, therefore, despite the fact that conspiracy was not at issue in *Chiu*, that case precluded liability for first degree deliberate and premeditated murder as a natural and probable consequence of a conspiracy to commit a non-homicide offense. Hector and Edward maintain that, following *Chiu*, there was no valid ground on which their convictions of first degree murder could be premised.

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[27] The parties do not dispute that *Chiu* applies to this case. (*Covarrubias, supra*, 1 Cal.5th at p. 902, fn. 26, quoting *People v. Rollins* (1967) 65 Cal.2d 681, 685, fn. 3 (*Rollins*) [*Chiu* governs this case; as a matter of normal judicial operation, even a non-retroactive decision ordinarily governs all cases pending on direct review when the decision was rendered].)

In their respondent's supplemental letter brief, the People concede that, pursuant to *Chiu*, Hector's and Edward's convictions of first degree deliberate and premeditated murder as aiders and abettors based on the natural and probable consequences doctrine must be reversed. We agree.

D. Analysis

The prosecution argued at trial that Edward and Hector were liable as aiders and abettors pursuant to the natural and probable consequences theory. The trial court instructed the jury that the prosecution was alleging two theories of liability for Edward and Hector: aiding and abetting and/or conspiracy, both under a natural and probable consequences theory. There is no question that the jury convicted Hector and Edward of first degree murder on a theory that is inconsistent with *Chiu*. (Cf. *People v. Rivera* (2015) 234 Cal.App.4th 1350, 1356 (*Rivera*) [when the California Supreme Court in *Chiu* was explaining the natural and probable consequences doctrine, it understood its applicability to both aiding and abetting and conspiracy theories].)

The People further acknowledge that Hector and Edward were prejudiced by the error. In *Chiu*, our high court determined that the defendant's first degree murder conviction must be reversed unless it could conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted first degree murder. (*Chiu, supra*, 59 Cal.4th at p. 167.) Here, as to these defendants, no alternative theory of guilt of first degree murder was presented to the jury. The jury necessarily relied on a theory of liability for first degree murder held invalid in *Chiu*.

The sole remaining matter is the remedy. Hector and Edward assert, and the People agree, that their first degree murder convictions must be reversed. We also agree. These defendants initially asserted that the matter must be remanded for a new trial on the murder charge, at which they cannot be convicted of an offense greater than second degree murder. The People respond that the matter must be remitted affording the prosecution the option either to accept a reduction in the convictions to second degree

murder, or, in the alternative, to retry Hector and Edward on the first degree murder charge under a direct aiding and abetting theory of liability.

In *Chiu*, the California Supreme Court reversed the first degree murder conviction and allowed the People either to accept a reduction of the conviction to second degree murder or to retry the greater offense. (*Chiu, supra*, 59 Cal.4th at p. 168.) Hector and Edward distinguish *Chiu* on the basis that, in that case, the appellant apparently did not argue that there was a factual basis supporting a verdict of manslaughter. According to these defendants, the evidence at trial could have supported a verdict of voluntary or involuntary manslaughter, second degree murder, or acquittal. They also assert that retrial pursuing a direct theory of aiding and abetting of murder would be inappropriate since there was no evidence to support such a theory in the first trial.

We are bound to apply the remedy employed by our high court in *Chiu*. (*Auto Equity Sales, supra*, 57 Cal.2d at p. 455.) That remedy has been embraced by other districts of the Courts of Appeal in considering *Chiu* error. (E.g., *In re Johnson* (2016) 246 Cal.App.4th 1396, 1408-1409; *In re Lopez* (2016) 246 Cal.App.4th 350, 353-354; *Rivera, supra*, 234 Cal.App.4th at p. 1359.) And this court recently applied it in the context of a habeas corpus petition. (*In re Cobbs* (2019) 41 Cal.App.5th1073, 1077-1082 (*Cobbs*)). Accordingly, we follow suit and direct that, upon remand, the People shall be offered the choice to accept a reduction of the first degree murder convictions of Hector and Edward to second degree murder or to retry the greater offense under a valid first degree murder theory. (*Chiu, supra*, 59 Cal.4th at p. 168.) **[28]**

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[28] As we discuss in part XII. of the Discussion, *post*, since our high court decided *Chiu*, the Legislature, by Senate Bill No. 1437, has "amend[ed] the felony murder rule *and the natural and probable consequences doctrine, as it relates to murder*, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f), italics added.)

VI. CALCRIM No. 521[29]

Hector and Edward assert that CALCRIM No. 521 does not adequately or correctly differentiate between premeditation and intent. Alvarez joins in the claim. Hector's and Edward's contention of instructional error as to CALCRIM No. 521 has been rendered moot by our determination in part V. of the Discussion, *ante.* Hector and Edward will either see their convictions reduced to second degree murder or face a new trial on a charge of first degree murder on a valid first degree murder theory. We address the merits of this contention because it has not been rendered moot as to Alvarez.

We shall discuss the procedural avenue available to eligible defendants to avail themselves of the ameliorative benefits of Senate Bill No. 1437, *post*.

29 The trial court instructed the jury with CALCRIM No. 521 as follows: "If you decide that the defendant has committed murder, you must decide whether it is murder of the first or second degree. The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately and with premeditation. [¶] The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice, and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before committing the acts that caused death. [¶] The length of time a person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] The defendant is guilty of first degree murder if the People have proved that the defendant murdered by shooting a firearm from a motor vehicle. The defendant committed this kind of murder if, one, he shot a firearm from a motor vehicle; two, he intentionally shot at a person who was outside the vehicle; and, three, he intended to kill that person. [¶] A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion. [¶] A *motor vehicle* includes a passenger vehicle. [¶] All other murders are of the second degree. The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder."

Defendants contend that CALCRIM No. 521 is not a correct statement of the law. Therefore, any failure to object in the trial court did not forfeit the contention. (See *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7, citing § 1259 [defendant's claim is that the instruction was not correct in law, and that it violated his right to due process of law; the claim therefore is not of the type that must be preserved by objection].)

"We determine independently whether a jury instruction correctly states the law. [Citation.] Our task is to determine whether the trial court ' "fully and fairly instructed on the applicable law." ' [Citation.] We consider the instructions as a whole as well as the entire record of trial, including the arguments of counsel. [Citation.] If reasonably possible, instructions are interpreted to support the judgment rather than defeat it." (*People v. McPheeters* (2013) 218 Cal.App.4th 124, 132.)

CALCRIM No. 521 adequately apprised the jury of the relevant legal principles. Our high court has explained that, " '[i]n the context of first degree murder, " 'premeditated' means 'considered beforehand.' " ' " (*People v. Houston* (2012) 54 Cal.4th 1186, 1216 (*Houston*).) According to these defendants, the language of CALCRIM No. 521, which stated, "[t]he defendant acted with premeditation if he decided to kill before committing the acts that caused death," eliminated the critical distinction between premeditation and intent to kill. We disagree. We do not find this sentence to be an incorrect statement of the law. In the context of the instruction, we see no meaningful distinction between " 'considered beforehand' " (*Houston*, at p. 1216) and "decided to kill before . . . " (CALCRIM No. 521).

Our high court has long held that CALJIC No. 8.20, predecessor to CALCRIM No. 521, was a correct statement of law. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1021 (*Lucero*).) While these defendants acknowledge as much, they assert that, because of the differences between these two instructions, case law holding that CALJIC No. 8.20 sufficiently defined premeditation does not serve as authority for a conclusion that CALCRIM No. 521 is a correct statement of the law. While case law holding that one

instruction is a correct statement of the law may not be authority for the validity of a different instruction, here, we conclude that these two instructions do not differ as substantially as these defendants assert. Both instructions inform the jury that a defendant commits first degree murder when he or she acts willfully, deliberately, and with premeditation. Both instructions define "premeditation." CALJIC No. 8.20 provides that the "word 'premeditated' relates to when a person thinks and means considered beforehand. One premeditates by deliberating before taking action." CALCRIM No. 521 provides that a "defendant acted with premeditation if he decided to kill before committing the acts that caused death." We do not agree with these defendants that CALCRIM No. 521 creates a "difficulty" not caused by CALJIC No. 8.20. We conclude that the phrase "considered beforehand" in CALJIC No. 8.20 and the phrase "decided to kill before committing the acts" in CALCRIM No. 521 both convey the correct principle of law concerning premeditation, meaning considered beforehand. (See *Houston, supra*, 54 Cal.4th at p. 1216.) These defendants argue that "[c]onsideration takes more time than decision." This argument seems to imply that a certain amount of time must pass to find premeditation. However, "[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." (*People v. Thomas* (1945) 25 Cal.2d 880, 900.) Moreover, other language in CALCRIM No. 521 instructed the jury that "[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time." While these defendants assert that this language compounded the problem, we are of the opinion that this language further clarified the requirements of deliberation and premeditation.

We conclude that CALCRIM No. 521 as given here was a correct statement of the law and adequately instructed the jury on the relevant legal principles. The definition of

premeditation in CALCRIM No. 521 is analogous to CALJIC No. 8.20, which was approved by our high court in *Lucero*, *supra*, 44 Cal.3d at page 1021.

In any event, even if we were to conclude that the instruction suffered from the ambiguity claimed by these defendants, reversal would not be required. We conclude that the evidence, discussed in detail in part II.D. of the Discussion, *ante*, overwhelmingly established that Alvarez murdered Clay deliberately and with premeditation. The purported instructional error was harmless under any standard. (See *Chapman, supra*, 386 U.S. at p. 24; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

VII. First Degree Murder Verdict Form

Alvarez asserts that his conviction for first degree murder must be reduced to murder in the second degree because the verdict form failed to comply with the requirements of section 1157.[30] We disagree.

Section 1157 provides in pertinent part: "Whenever a defendant is convicted of a crime . . . which is distinguished into degrees, the jury . . . *must find the degree of the crime* . . . of which he is guilty. Upon the failure of the jury . . . to so determine, the degree of the crime . . . of which the defendant is guilty, shall be deemed to be of the lesser degree." (Italics added.) " 'Section 1157 applies "whenever the jury neglects to explicitly specify the degree of the crime" in the verdict form.' " (*People v. Jones* (2014) 230 Cal.App.4th 373, 377 (*Jones*), quoting *People v. San Nicolas* (2004) 34 Cal.4th 614, 634.) Courts have consistently applied section 1157 " 'strictly and literally in favor of defendants, so much so that "on this point, form triumphs over substance, and the law is traduced." ' " (*Jones*, at p. 377, quoting *People v. Williams* (1984) 157 Cal.App.3d 145, 153.)

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[30] Edward and Hector make the same contention, but their claims are rendered moot by our conclusion in part V. of the Discussion.

Here, the verdict form on count one reads: "We, the jury in the above-entitled cause, find the Defendant, MANUEL ALVAREZ, JR., GUILTY of the crime of a violation of section 187(a) of the Penal Code of the State of California, (*First Degree Murder*), as charged in Count One of the Information."[31] (Italics added.) As the italicized language indicates, the jury expressly found Alvarez guilty of first degree murder.[32]

The trial court provided the jury with explicit instructions on how to fill out the verdict forms. In doing so, the trial court specifically identified the different verdict forms applicable to defendants, including those indicating findings that each defendant was guilty of first degree murder and that each defendant was not guilty of first degree murder but guilty of second degree murder. Additionally, the trial court instructed the jury that it would "receive verdict forms of guilty and not guilty for the greater crime and, also, verdict forms of guilty and not guilty for the lesser crime." The court further instructed the jury that, if all jurors agreed that a defendant was guilty of the greater crime, they were to complete and sign the verdict form indicating a finding of guilty of that crime, and they were not to complete or sign any other verdict form as to that particular count. The court also instructed the jury that, "if all of you agree that the People have not proved beyond a reasonable doubt that the defendant is guilty of the greater crime and you also agree that the People have proved beyond a reasonable doubt that he is guilty of the lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for guilty of the lesser crime."

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[31] Count one of the amended information charged defendants, inter alia, with "a violation of Section 187(a) of the Penal Code of the State of California, in that said defendants did unlawfully, and with malice aforethought murder . . . , a human being." (Capitalization omitted.)

[32] The verdict form also included separate findings for each enhancement.

After the jury returned its verdicts, the trial court polled the jurors as to the verdicts as to each defendant. Furthermore, the record contains the *unsigned* verdict forms which the jury would have signed had it found each defendant not guilty of first degree murder and guilty of second degree murder. The fact that the jury filled out verdict forms stating that the jurors found these defendants guilty of first degree murder instead of the forms indicating a guilty finding for second degree murder is indicative of the jury's intent and undermines any contention that the forms presented an ambiguity.

Alvarez relies on *People v. McDonald* (1984) 37 Cal.3d 351 (*McDonald*), overruled in part by *People v. Mendoza* (2000) 23 Cal.4th 896, 914. However, in *McDonald*, the verdict returned by the jury read: " 'We, the jury in the above-entitled action, find the Defendant Eddie Bobby McDonald, guilty of *MURDER*, in Violation of Section 187 Penal Code, a felony, *as charged in Count I of the information*.' " (*McDonald*, at p. 379.) The defendant on appeal asserted that, because the jury failed to specify the degree of murder in its original verdict, by operation of law pursuant to section 1157, the degree was fixed at second degree murder. (*McDonald*, at pp. 379-380.) Our high court agreed, holding that section 1157 "applies whenever the jury neglects to explicitly specify the degree of the crime." (*McDonald*, at p. 381, fn. omitted.)

Here, as in *McDonald*, the verdict forms included the wording, "as charged in Count One of the Information." However, critically, here, the verdict form also specified quite clearly in a parenthetical that the jury found Alvarez guilty of "First Degree Murder." Section 1157 only applies " ' "when[] the jury neglects to explicitly specify the degree of the crime" in the verdict form.' " (*Jones, supra*, 230 Cal.App.4th at p. 377.) Thus, even construed strictly and literally (*ibid*.), section 1157 does not apply here. The jury, on the verdict form, explicitly found that Alvarez was guilty of first degree murder by filling out the form that expressly indicated first degree murder and not the form that indicated second degree murder. "That the verdict referred to the crime 'as charged in

. . . the Information,' and the information merely charged generic murder without specifying the degree thereof, does not change this." (*Jones*, at p. 377.) This was "not a situation where the verdict [form] simply stated defendant was found guilty of murder as charged in the information [citation] or where no degree was explicitly stated in the verdict and the degree had to be inferred from a special circumstance or other finding also made by the jury." (*Id.* at p. 378.) The jury's intent to find Alvarez guilty of first degree murder was abundantly clear.

Nonetheless, Alvarez asserts that the verdict was ambiguous and presented a legal impossibility because, while the verdict form specified first degree murder, it also referred to an information silent as to degree. The *Jones* court rejected this contention, as do we. (*Jones, supra*, 230 Cal.App.4th at pp. 378-379.) "Section 1157 requires that the jury find the degree of the crime and explicitly specify that degree in the verdict form. The verdict here expressly states a finding of first degree murder. ' " 'A verdict is to be given a reasonable intendment and be construed in light of the issues submitted to the jury and the instructions of the court.' [Citations.]" [Citations.] "The form of a verdict is immaterial provided the intention to convict of the crime charged is unmistakably expressed. [Citation.]" [Citation.] "[T]echnical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice." ' " (*Jones*, at pp. 378-379.) Here, based on the instructions given to the jury, the verdict forms completed, and the unsigned verdict forms returned to the court, the jury's intent to convict Alvarez of first degree murder is unmistakably clear. The jury unequivocally found Alvarez guilty of first degree murder. This was sufficient to satisfy the requirements of section 1157.

VIII. CALCRIM No. 600 and the "Kill Zone" Instruction

A. Additional Background

The trial court instructed the jury with CALCRIM No. 600 on attempted murder, in pertinent part, as follows: "To prove that the defendant is guilty of attempted murder,

the People must prove that, one, the defendant took at least one direct but ineffective step toward killing another person; and, two, the defendant intended to kill that person. [¶] . . . [¶] A person may intend to kill a specific victim or victims and at the same time intend to kill everyone *in a particular zone of harm or 'kill zone*.' [¶] In order to convict the defendant of the attempted murder of Gary Motheral and Ali Khan, the People must prove that the defendant not only intended to kill Stephen Clay, but also either intended to kill Gary Motheral and Ali Khan, *or intended to kill everyone within the kill zone*. If you have a reasonable doubt whether the defendant intended to kill Gary Motheral and Ali Khan or intended to kill Stephen Clay by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Gary Motheral and Ali Khan." (Italics added.)

B. Defendants' Contentions

In their opening briefs, Hector and Edward asserted that the trial court erred in instructing the jury with "unnecessary, argumentative and misleading language about a 'kill zone.' " Thereafter, we granted Hector's and Edward's requests to file supplemental briefing on this issue. Alvarez filed a letter on the same day Hector filed his supplemental brief, joining in the arguments on the kill zone instruction.[33] These defendants asserted that the facts of this case did not support the kill zone instruction, relying on *People v. McCloud* (2012) 211 Cal.App.4th 788, as well as another Court of Appeal, Second Appellate District, Division One, case that was depublished upon the California Supreme Court granting review before California Rule of Court, rule 8.1115(e) went into effect.[34] They asserted that the evidence does not support the theory that Alvarez intended to kill Clay by means of killing everyone within a purported kill zone.

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[33] Ballesteros did not assert any contentions regarding the kill zone instruction in his opening brief; nor did he participate in supplemental briefing on the issue.

[34] *People v. Sek* (2015) 235 Cal.App.4th 1388, review granted July 22, 2015, S226721.

They also argued that it is error to instruct on a theory which is not supported by the evidence. They further asserted that, even if the theory was applicable, CALCRIM No. 600 does not adequately define the kill zone or require a finding that the victims be located in the kill zone. Additionally, they asserted that the kill zone instruction allowed the jury to use a finding that Alvarez intended to kill everyone within the kill zone as a substitute for a finding that he actually intended to kill Motheral and Khan. This, they argued, is improper because it allows for conviction of attempted murder based on evidence that is insufficient to prove specific intent to kill.

On the day of oral argument, our high court decided *Canizales, supra,* 7 Cal.5th 591. Following oral argument, we directed Hector, Edward, and Alvarez to submit supplemental briefs addressing *Canizales* and particular issues related thereto.[35] In their supplemental briefs, these defendants assert, among other things, that the kill zone instruction should not have been given as it was not supported by substantial evidence. Defendants argue that under the facts of this case, it cannot be said that the *only* permissible inference was that Alvarez intended to kill everyone in the area surrounding Clay, the intended target. Defendants also assert that the kill zone instruction given here was deficient and the trial court's error in instructing the jury on the kill zone theory cannot be deemed harmless under *Chapman*.

In the respondent's supplemental brief, the People concede, in light of *Canizales*, that the trial court erred in instructing the jury on the kill zone theory of attempted murder. The People concede that "[n]o substantial evidence supported the inference that Alvarez intended to kill everyone near the intended target (Stephen Clay) to ensure the

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[35] Among those issues was the retroactive applicability of *Canizales*. The parties all agree, as do we, that *Canizales* applies here, and we need not address the matter in further detail. (*Covarrubias, supra,* 1 Cal.5th at p. 902, fn. 26, quoting *Rollins, supra,* 65 Cal.2d at p. 685, fn. 3 [as a matter of normal judicial operation, even a non-retroactive decision ordinarily governs all cases pending on direct review when the decision was rendered].)

primary target's death." The People further concede that the kill zone instruction given was flawed, and that, like in *Canizales*, the prosecutor exacerbated the error by arguing that a kill zone did not require the intent to kill a particular person, and that firing into a group of people was sufficient. However, citing *People v. Aledamat* (2019) 8 Cal.5th 1 (*Aledamat*), the People assert that "Alvarez's specific intent to kill [Motheral and Khan] was plain regardless of any error in the 'kill zone' instruction. Thus the error was harmless beyond a reasonable doubt."

We accept the People's concession and agree that, under *Canizales*, reliance on the kill zone theory was improper and the trial court erred in instructing the jury on the kill zone theory. However, contrary to the People's contention, we cannot conclude that the error was harmless beyond a reasonable doubt.

C. Instructional Duty

" 'The trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." [Citation.] "It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference." ' " (*People v. Alexander* (2010) 49 Cal.4th 846, 920-921.) It is error for a trial court to give an instruction which has no application to the facts of the case. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 (*Guiton*).)

D. The Kill Zone Theory of Liability for Attempted Murder

" 'The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice—a conscious disregard for life—suffices. [Citations.] In contrast, '[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act

toward accomplishing the intended killing.' " (*People v. Smith* (2005) 37 Cal.4th 733, 739.) "[I]ntent to kill does not transfer to victims who are not killed, and thus 'transferred intent' cannot serve as a basis for a finding of attempted murder." (*People v. Perez* (2010) 50 Cal.4th 222, 232 (*Perez*); see *People v. Bland* (2002) 28 Cal.4th 313, 326-331 (*Bland*).) Thus, "[s]omeone who in truth does not intend to kill a person is not guilty of that person's attempted murder even if the crime would have been murder—due to transferred intent—if the person were killed. To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*Bland*, at p. 328.)

In *Bland*, the California Supreme Court introduced into California jurisprudence the kill zone theory of attempted murder liability. (*Bland*, *supra*, 28 Cal.4th at pp. 319-333.) The defendant in *Bland* shot into a car and, as the driver began to drive away, the defendant and another man continued shooting at the car. (*Id*. at p. 318.) The driver died, and the two passengers in the vehicle were wounded. (*Ibid*.) The defendant was convicted of the murder of the driver and the attempted murder of the two passengers. (*Ibid*.) The Court of Appeal reversed the two attempted murder convictions. (*Ibid*.) Our high court reversed the Court of Appeal based on the kill zone theory of liability. (*Id*. at pp. 329-331.) Relying on a Maryland decision,[36] our high court stated: "although the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what [the Maryland court] termed the 'kill zone.' 'The intent is concurrent . . . when the nature and scope of the attack, while directed at a

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[36] *Ford v. State* (Md.Ct.App. 1993) 330 Md. 682 [625 A.2d 984] (*Ford*), disapproved on another ground in *Henry v. State* (Md.Ct.App. 2011) 419 Md. 588 [19 A.3d 944].

primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone *in that victim's vicinity*. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a *hail of bullets* or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A. Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone. This situation is distinct from the "depraved heart" [i.e., implied malice] situation because the trier of fact may infer the actual intent to kill which is lacking in a "depraved heart" [implied malice] scenario.' (*Ford v. State, supra*, 625 A.2d at pp. 1000-1001, fn. omitted.)" (*Bland*, at pp. 329-330, italics added.)

In *Canizales*, our high court provided guidance as to the applicability of the kill zone theory. Our high court held: "a jury may convict a defendant under the kill zone theory only when the jury finds that: (1) the circumstances of the defendant's attack on a primary target, including the type and extent of force the defendant used, are such that the only reasonable inference is that the defendant intended to create a zone of fatal harm—

that is, an area in which the defendant intended to kill everyone present to ensure the primary target's death—around the primary target and (2) the alleged attempted murder victim who was not the primary target was located within that zone of harm. Taken together, such evidence will support a finding that the defendant harbored the requisite specific intent to kill both the primary target and everyone within the zone of fatal harm." (*Canizales, supra*, 7 Cal.5th at pp. 596-597.) Conversely, "the kill zone theory does not apply where 'the defendant merely subjected persons near the primary target to lethal risk. Rather, in a kill zone case, the defendant has a primary target and reasons [that] he cannot miss that intended target if he kills everyone in the area in which the target is located.' " (*Id.* at p. 607, quoting *People v. Medina* (2019) 33 Cal.App.5th 146, 156.) The court stated that, "[i]n determining the defendant's intent to create a zone of fatal harm and the scope of any such zone, the jury should consider the circumstances of the offense, such as the type of weapon used, the number of shots fired (where a firearm is used), the distance between the defendant and the alleged victims, and the proximity of the alleged victims to the primary target." (*Canizales*, at p. 607.) Our high court further stated: "Past appellate court opinions articulating the kill zone theory are incomplete to the extent that they do not require a jury to consider the circumstances of the offense in determining the application of the kill zone or imply that a jury need not find a defendant intended to kill everyone in the kill zone as a means of killing the primary target, even if their description of the theory is otherwise consistent with our opinion here." (*Id.* at p. 607, fn. 5.)

Our high court continued: "We caution, however, that trial courts must be extremely careful in determining when to permit the jury to rely upon the kill zone theory. The kill zone theory permits a jury to infer a defendant's intent to kill an alleged attempted murder victim from circumstantial evidence (the circumstances of the defendant's attack on a primary target). But, under the reasonable doubt standard, a jury may not find a defendant acted with the specific intent to kill everyone in the kill zone if

the circumstances of the attack would also support a reasonable alternative inference more favorable to the defendant. (See CALCRIM No. 225.) Permitting reliance on the kill zone theory in such cases risks the jury convicting a defendant based on the kill zone theory where it would not be proper to do so. As past cases reveal, there is a substantial potential that the kill zone theory may be improperly applied, for instance, where a defendant acts with the intent to kill a primary target but with only conscious disregard of the risk that others may be seriously injured or killed. Accordingly, in future cases trial courts should reserve the kill zone theory for instances in which there is sufficient evidence from which the jury could find that *the only reasonable inference is that the defendant intended to kill (not merely to endanger or harm) everyone in the zone of fatal harm*." (*Canizales, supra,* 7 Cal.5th at p. 597, italics added.)

E. Analysis

1. Application of *Canizales*

Turning to the facts here, at the scene, people were squaring off, advancing, retreating, and fighting. Alvarez testified that, seeing Clay advancing towards Rodriguez with a knife, he pointed the gun at Clay and started shooting. He testified that he was trying to shoot Clay. He testified: "I'm trying to shoot the guy that I seen running over there." Alvarez kept shooting until the gun stopped firing. A cluster of 13 cartridge casings were found at the location. The location of the cartridge casings, Clay's body, and bullet fragments indicate that Alvarez fired at Clay from more than 90 feet away. (See *Canizales, supra,* 7 Cal.5th. at p. 611 [shots fired at a distance of either 100 or 160 feet].) Motheral and Khan, the attempted murder victims, were both near Clay at the time of the shooting. Vance, also a member of Amaro's group and who was not shot and was not the subject of an attempted murder charge, was also near Clay at the time. While Alvarez was somewhat forthcoming concerning his intent to shoot Clay, he said nothing about intending to shoot Motheral or Khan. No one else testified that Alvarez was targeting Motheral or Khan or, for that matter, anyone in particular. Additionally, what

area constituted the "kill zone" was not factually defined with particularity by the circumstances of the shooting, and did not, by its nature, necessarily indicate intent to kill everyone within it. (*Ibid*. ["the attack occurred at a block party on a wide city street, not in an alleyway, cul-de-sac, or some other area or structure from which victims would have limited means of escape"].) Substantial evidence did not support the conclusion that the *only* reasonable inference was that Alvarez intended to kill "everyone in the zone of fatal harm." (*Ibid*.) We accept the People's concession and agree that the trial court here erred in instructing the jury on the kill zone.

2. Misuse of the Kill Zone Instruction by the Jury and Prejudice

In *Canizales*, our high court stated that, "[i]n determining whether a legally inadequate theory was conveyed to the jury . . . , we must ask whether there is a ' "reasonable likelihood" ' that the jury understood the kill zone theory in a legally impermissible manner. [Citations.] In doing so, we consider the instructions provided to the jury and counsels' argument to the jury." (*Canizales, supra*, 7 Cal.5th at p. 613; accord *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [116 L.Ed.2d 385]; *People v. Kelly* (1992) 1 Cal.4th 495, 525; see generally *Guiton, supra*, 4 Cal.4th at p. 1128.)

Like in *Canizales*, the kill zone instruction used here, "[b]eyond its reference to a 'particular zone of harm,' . . . provided no further definition of the term 'kill zone.' Nor did the instruction direct the jury to consider evidence regarding the circumstances of defendants' attack when determining whether defendants 'intended to kill . . . by killing everyone in the kill zone.' " (*Canizales, supra*, 7 Cal.5th at p. 613.)

The prosecutor argued that Clay was the targeted individual, stating, in part: "[In] this particular case Mr. Alvarez, he didn't care who he killed besides . . . Clay. He was pointing his gun over against and at the people that he was fighting against." The prosecutor argued that "the law lays out the kill zone, and it says, the person may have an intent to kill a specific victim, like . . . Clay, and at the same time intend to kill anyone in a particular harm zone, kill everyone in the particular harm zone - - zone of harm."

(Italics added.) However, the prosecutor also argued that Alvarez "*didn't care* who he killed besides . . . Clay," "*[h]e doesn't care if he shoots one particular person, specifically, or if he shoots everyone who's over there who's fighting his crew*," and "[h]is intent is to shoot into this group of people who are fighting his group, and *he doesn't care if he's specifically killing this person or this person. He's happy to take out whoever he hits*." (Italics added.)

Like our high court in *Canizales*, we conclude here that "there is a reasonable likelihood that the jury understood the kill zone instruction in a legally impermissible manner." (*Canizales, supra*, 7 Cal.5th at p. 614.) "The court's error in instructing on the factually unsupported kill zone theory, combined with the lack of any clear definition of the theory in the jury instruction as well as the prosecutor's misleading argument, could reasonably have led the jury to believe that it could find that defendants intended to kill [Motheral and Khan] based on a legally inaccurate version of the kill zone theory — that is, that defendants could be found guilty of the attempted murder of [Motheral and Khan] if [Alvarez] shot at [Clay] knowing there was a substantial danger he would also hit" Motheral and Khan. (*Canizales*, at p. 614.)

Here, as in *Canizales*, the court instructed on intent to kill the attempted murder victims in addition to the legally erroneous kill zone theory. When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally erroneous, we apply the beyond a reasonable doubt standard established in *Chapman, supra*, 386 U.S. at page 24, to determine whether the error is harmless. (*Aledamat, supra*, 8 Cal.5th at p. 11.) "The reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, it determines the error was harmless beyond a reasonable doubt." (*Id*. at pp. 2-3.) In other words, "we ask 'whether it is clear beyond a reasonable doubt that a reasonable jury would have rendered the same verdict absent the error.' " (*Canizales*, at p. 615, quoting *People v. Merritt* (2017) 2 Cal.5th 819, 831.) Here, we must be able to

say that the prosecution proved that Alvarez intended to kill Motheral and Khan, and that, beyond a reasonable doubt, the jury did not convict on the premise that Alvarez's shooting of Motheral and Khan resulted from indiscriminate shooting as he attempted to shoot Clay.

Turning back to the evidence, the two groups squared off against each other, with some wielding weapons, including sticks, canes, and knives. An individual wielding a stick approached Rodriguez and struck him on the head just above his eye. Then another individual struck him on the shoulder with a cane. According to Khan, Rodriguez advanced on him, attempted to punch him, and retreated, Khan ran after him, and then Vance and Khan both struck Rodriguez. Gunfire erupted. According to Khan, when the shooting started, Clay "and them" were standing behind Khan. According to Khan, Clay was "[r]ight behind" him. Khan testified that Motheral was by Clay, "because they both got shot pretty much by each other." Khan estimated that, at the time the shooting began, Clay may have been "about five" feet away from him, and Motheral was a couple of feet farther away. Khan also testified that, before the gunshots were fired, he, Clay, and Motheral were all "pretty close together." Khan was shot in the leg, Motheral was shot in the back, and Clay was shot in the back and killed. Police recovered 13 .40-caliber cartridge casings at the scene, all fired from the same firearm, as well as a number of bullet fragments.

In his testimony, Alvarez stated that, once the fight began, he saw someone hit Rodriguez with a stick, and Rodriguez fell. Alvarez then observed an individual who had a knife approaching Rodriguez. Alvarez also saw another individual with a knife running toward Rodriguez. He saw that one of the guys with a knife was still going toward Rodriguez, who was trying to get up off the ground. Additionally, there were still two individuals with sticks nearby. Alvarez did not think that they were going to let Rodriguez go. Alvarez observed Clay, wielding a knife, approach to within eight to 10 feet of Rodriguez. Alvarez pointed the gun at Clay and started shooting. As noted, he

testified: "I'm trying to shoot the guy that I seen running over there." Alvarez kept shooting until the gun stopped firing.

Alvarez fired 13 shots at Clay and in his vicinity from at least 90 feet away and possibly more. The evidence indicates that Clay was running at the time he was targeted by Alvarez. There is strong evidence, including Alvarez's own testimony, that Clay was Alvarez's intended target. As we have noted, the prosecutor argued that Alvarez fired indiscriminately as he targeted Clay. Thus, like in *Canizales*, the prosecutor's argument further supports a finding of prejudice. (*Canizales*, *supra*, 7 Cal.5th at p. 616.) The combination of the prosecutor's closing argument and CALCRIM No. 600 "had the potential to cause confusion regarding the application of the kill zone theory." (*Canizales*, at p. 616.)

The question remains whether the error was harmless beyond a reasonable doubt under *Chapman*. Here, we note the evidence suggests that, despite Alvarez's testimony, he also targeted Motheral as he ran, because like Clay, Motheral was shot in the back. A similar inference could be drawn relative to Khan, who, although he was shot in the leg, testified that he heard bullets whiz by his face. This inference, however, is less compelling than the inference that could be drawn for Motheral because Khan testified that Clay was behind him and naturally the bullets meant for Clay would have whizzed past Khan. It is also clear that no members of Alvarez's group was struck by his gunfire. Thus an inference could be drawn that Alvarez was aiming at members of the rival group.

As the People emphasize on appeal, the prosecutor advanced two theories in his closing argument concerning the attempted murders of Motheral and Khan: (1) intent to kill those individuals, and (2) kill zone. However, our reading of the argument reveals that the prosecutor's argument focused, more on Alvarez shooting indiscriminately as he fired at Clay than on an intent to kill Motheral and Khan. Although we have discussed the kill zone argument advanced by the prosecutor, *ante*, we set forth the entirety of the

attempted murder argument here so that the arguments for both theories can be considered in context.

The prosecutor told the jury: "Attempted murder, there are two elements: The defendant took a direct but ineffective step towards killing another person, and the defendant intended to kill that person. Did he take direct but ineffective steps, meaning, did he fire the gun down the street, hit . . . Motheral in the back and hit . . . Khan in the leg? Yes, he took those steps. Did he have an intent to kill? Again, it's – the facts speak for themselves in terms of who he was aiming at, how they were positioned, where they were running, how many shots were fired and where the shots were being directed; the fact that no one in his group was hit, the fact that three people were, the location of the bullet holes in the fence. [¶] I want to talk with you about this second element. Let me go back real quickly. [¶] The defendant intended to kill that person, is the second element, *but you have a scenario in here that is a little unique, because you have what the law describes as a kill zone*. Okay. And the law lays out the kill zone, and it says, the person may have an intent to kill a specific victim, like . . . Clay, and at the same time intend to kill anyone in a particular harm zone, kill everyone in the particular harm zone – zone of harm. [¶] In this case – in this particular case Mr. Alvarez, *he didn't care who he killed besides . . . Clay*. He was pointing his gun over against and at the people that he was fighting against. [¶] This is – this is a representation of what a kill zone looks like. Right there. [**37**] Want to see what a kill zone looks like? Bullet holes all the way through the fence, guy shot in the back, guy shot in the leg, another guy shot in the back lying on the ground and dead. *He doesn't care if he shoots one particular person, specifically, or if he shoots everyone who's over there who's fighting his crew*. *That is*

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37 The prosecutor's argument reads as if he was pointing to an exhibit, but the prosecutor did not reference what exhibit, so we have no way of connecting this part of his argument to specific evidence.

his intent. His intent is to shoot into this group of people who are fighting his group, and he doesn't care if he's specifically killing this person or this person. He's happy to take out whoever he hits. That is a kill zone, all right. That makes you liable for attempted murder." (Italics added.)

As can be seen by placing in context the prosecutor's argument on the two theories he advanced, he all but abandoned an argument on intent to kill Motheral and Khan. After briefly discussing intent to kill, he immediately focused on kill zone, saying: "*but* you have a scenario in here that is a little unique, because you have what the law describes as a kill zone." (Italics added.) He argued that Alvarez "didn't care who he killed besides . . . Clay." Not only did the prosecutor shift the focus off evidence of specific intent to kill Motheral and Khan, but what he argued sounded more like conscious disregard of the risk that others may be seriously injured or killed and thus, was inconsistent with the law related to kill zone, which even before *Canizales* required an *intent to kill everyone* in the kill zone. Nor did he argue that, from the evidence, a reasonable inference could be drawn that Alvarez intended to kill (not merely to endanger or harm) everyone in the zone of fatal harm. As we read the prosecutor's argument, essentially as a shortcut around finding intent to kill, the jury could find Alvarez liable for the attempted murder of Motheral and Khan by finding that he was recklessly indifferent to the risk they could be wounded or killed.

Thus, while the trial court instructed on intent to kill and the prosecutor mentioned that theory in his closing argument, those circumstances did not overcome the potential for confusion created by the attempted murder instruction in combination with the prosecutor's argument. Taken together, it cannot be said beyond a reasonable doubt that a reasonable jury would have concluded defendant targeted Motheral and Khan specifically. (See *Canizales*, *supra*, 7 Cal.5th at p. 616.)

Accordingly, based on the evidence and the prosecutor's argument, we cannot conclude, beyond a reasonable doubt, that a reasonable jury would have returned guilty

verdicts on the attempted murder counts absent the instructional error. We must, therefore, reverse the attempted murder convictions as to Alvarez, Hector, and Edward.

IX. Cruel and Unusual Punishment

Hector and Edward advance several arguments in asserting that their sentences violate the cruel and unusual punishment prohibitions of the Eighth Amendment of the United States Constitution and article I, section 17, of the California Constitution. In this regard, Edward says he was 19 years old at the time of the offense. We note that he was born on September 1, 1987, and thus was actually two weeks from his 20th birthday. He argues that he was sentenced to the functional equivalent of LWOP, and based on his age, he contends his sentence violates the Eighth Amendment prohibition against cruel and unusual punishment, citing *Graham v. Florida* (2010) 560 U.S. 48 [176 L.Ed.2d 825] (*Graham*) and *Miller v. Alabama* (2012) 567 U.S. 460 [183 L.Ed.2d 407] (*Miller*). Edward and Hector both also argue that their sentences are unconstitutional under a traditional proportionality test.

However, we conclude that their traditional proportionality contentions have been forfeited by the failure to raise them before the trial court. (E.g., *People v. Speight* (2014) 227 Cal.App.4th 1229, 1247-1248 [a defendant's failure to contemporaneously object that his sentence constitutes cruel and unusual punishment forfeits the claim on appellate review; a claim a sentence is cruel and unusual is forfeited on appeal if it is not raised in the trial court, because the issue often requires a fact-bound inquiry].) Furthermore, these defendants' proportionality contentions have been rendered moot by our determination that their murder conviction must be reduced to second degree murder, their attempted murder convictions must be reversed and the gang and vicarious use firearm enhancements must be stricken.

As for Edward's *Graham/Miller* contention, even if somehow those cases could be applied to someone who was almost 20 years old, the claim has been rendered moot not only by the aforementioned determinations, but also by the enactment of section 3051.

(§ 3051, subd. (a)(1) [youthful offender parole hearing provisions apply to defendants who were under age 23 at the time of the controlling offense]; *People v. Franklin* (2016) 63 Cal.4th 261, 276-277.)

X. Misdemeanor Manslaughter Theory of Involuntary Manslaughter

A. Ballesteros's Contentions[38]

Ballesteros contends that the trial court prejudicially erred in failing to instruct the jury on an alternate theory of involuntary manslaughter based on the commission of a misdemeanor (misdemeanor manslaughter).[39] Section 192, subdivision (b) sets forth two theories of involuntary manslaughter: (1) unlawful killing without malice in the commission of an unlawful act not amounting to a felony, with criminal negligence (misdemeanor manslaughter), and (2) an unlawful killing without malice in the commission of a lawful act which might produce death with criminal negligence. Ballesteros asserts that substantial evidence supported a misdemeanor manslaughter

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[38] Alvarez, Edward and Hector join in this argument. However, none of these defendants supplied any argument on this issue or any claim of prejudice specific to each of them individually. As we have noted, joinder in appellate argument may be broadly permitted (Cal. Rules of Court, rule 8.200(a)(5)), but each appellant has the burden of demonstrating error *and prejudice*. (*Nero, supra,* 181 Cal.App.4th at p. 510, fn. 11.) Their reliance solely on Ballesteros's arguments and reasoning from the trial involving his separate jury is insufficient to satisfy their burdens on appeal. Accordingly, we address this instructional error issue only as to Ballesteros.

[39] Ballesteros argues, without citation to authority, that he was entitled to this instruction as to both counts of attempted murder as well as the murder count. There is no crime of attempted involuntary manslaughter, because an attempt requires an intent to commit a crime (here an intent to commit an unlawful killing) and involuntary manslaughter is an unintentional killing. It is not possible to intend to commit an unintentional killing. (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332.) Accordingly, we address Ballesteros's claim of instructional error only as it applies to the murder count.

instruction and therefore the court had the sua sponte duty to instruct on that theory.[40] We agree that the trial court erred in failing to give this instruction sua sponte. However, we further conclude that Ballesteros was not prejudiced by the error.

B. Additional Background

Using a version of CALCRIM No. 580, the trial court instructed Ballestros's jury on a single theory of involuntary manslaughter -- lawful act of self-defense with criminal negligence. The instruction stated, in pertinent part: "When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter. [¶] The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of that risk, is voluntary manslaughter or murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter." The court then provided the definition of conscious disregard of the risk to human life and criminal negligence. Thereafter, the court instructed the jurors: "The defendant committed involuntary manslaughter if, one, the defendant committed a lawful act of self-defense or defense of others but acted with criminal negligence; and, two, the defendant's act unlawfully caused the death of another person."

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[40] Ballesteros asserts that the following portion of CALCRIM No. 580 should have been given here: "The defendant committed involuntary manslaughter if: [¶] 1. The defendant committed (a crime); [¶] 2. The defendant committed the (crime) with criminal negligence; [¶] AND [¶] 3. The defendant's acts caused the death of another person."

C. Principles of Law Related to Instructing on Lesser Included Offenses

" ' "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense.' " (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 (*Breverman*).) Thus, in *Breverman*, the California Supreme Court concluded: "California law requires a trial court, sua sponte, to instruct fully on all lesser necessarily included offenses supported by the evidence. . . . [I]n a murder prosecution, this includes the obligation to instruct on *every supportable theory* of the lesser included offense of voluntary manslaughter, not merely the theory or theories which have the strongest evidentiary support, or on which the defendant has openly relied." (*Id.* at pp. 148-149, italics added.) While *Breverman* addressed the sua sponte duty to instruct on the lesser included offense of *voluntary* manslaughter, this sua sponte duty applies to theories of *involuntary* manslaughter as well. (See *People v. Bohana* (2000) 84 Cal.App.4th 360, 372 (*Bohana*).)

The trial court is required to instruct on a lesser included offense " 'whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.] "Substantial evidence" in this context is

" 'evidence from which a jury composed of reasonable [persons] could . . . conclude[]' " that the lesser offense, but not the greater, was committed.' " (*People v. Romero* (2008) 44 Cal.4th 386, 403, quoting *Breverman, supra,* 19 Cal.4th at p. 162.)

D. Analysis

1. Failure to Give a Misdemeanor Manslaughter Instruction

We agree with Ballesteros that, under *Breverman,* the trial court's duty to instruct, sua sponte, on lesser included offenses extends not only to the theories the parties pursue at trial, but also those theories supported by substantial evidence. Contrary to the People's contention, the court was not relieved of its sua sponte duty to instruct on a theory of involuntary manslaughter supported by substantial evidence merely because that theory was not embraced by defense counsel at trial. (See *Breverman, supra,* 19 Cal.4th at pp. 148-149.)

We further conclude that there was substantial evidence to support the misdemeanor manslaughter instruction with the misdemeanor being disturbing the peace (§ 415).[41] The evidence established that the Garcia group, including Ballesteros, went to Eleanor Avenue, at minimum, to fight with Amaro's group. Ballesteros furnished his Monte Carlo to aid in this enterprise, providing the shooter, Alvarez, with transportation to Eleanor Avenue. The evidence further showed that, at Eleanor Avenue, members of each group challenged each other to fight, and they fought in a public place.[42] Therefore,

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[41] Because we find that substantial evidence supports the conclusion that Ballesteros committed the crime of disturbing the peace, which applies to both the aider and abettor theory and the coconspirator theory, we need not address the crimes of battery or assault by means of force likely to produce great bodily injury, other theories relevant to Ballesteros's liability as an aider and abettor.

[42] One of the statutory definitions of disturbing the peace is where a person "unlawfully fights in a public place or challenges another person in a public place to fight." (§ 415, subd. (1).)

substantial evidence supported the premise that Ballesteros committed or aided and abetted a non-felony crime—disturbing the peace. Substantial evidence further supported the premise that, during the commission of that crime, a coparticipant committed murder or a lesser included offense. Finally, substantial evidence supported the premise that, under the circumstances, a reasonable person in Ballesteros's position would have known that involuntary manslaughter was one of the natural and probable consequences of the commission of disturbing the peace. (CALCRIM Nos. 403 [Natural and Probable Consequences], 580 [Involuntary Manslaughter: Lesser Included Offense].)[43] Because we conclude that substantial evidence supported giving CALCRIM No. 580 on a misdemeanor manslaughter theory of involuntary manslaughter, we further conclude that the trial court erred in failing to give this instruction to the jury sua sponte. (See generally *Breverman, supra*, 19 Cal.4th 142; *Bohana, supra*, 84 Cal.App.4th at p. 372.)

2. Harmless Error

Although the trial court erred in not giving a misdemeanor manslaughter instruction, we conclude that the failure to do so was harmless. In *Breverman*, our high court stated that, "in a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under *Watson*. A conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable

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[43] Having concluded that the instruction was warranted under an aider and abettor/natural and probable consequences theory, we need not also consider whether it was warranted based on an uncharged conspiracy/natural and probable consequences theory.

outcome had the error not occurred." (*Breverman, supra*, 19 Cal.4th at p. 178, citing *Watson, supra*, 46 Cal.2d at p. 836.)

Ballesteros acknowledges this rule, but contends that California courts apply the harmless error standard from *Chapman, supra*, 386 U.S. 18, where instructional error constitutes federal constitutional error. We reject Ballesteros's contention that the instructional error here violated his federal constitutional rights, requiring prejudice to be determined under the *Chapman* standard. First, in support of this contention, Ballesteros initially relies upon the Court of Appeal's opinion in *People v. Randle* (2003) 109 Cal.App.4th 313, 322. But review was granted in that case and the California Supreme Court determined long before this case that such errors are to be determined under the *Watson* test. (*People v. Randle* (2005) 35 Cal.4th 987, 1003, disapproved on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.)

Second, as set forth *ante*, our high court has clearly and explicitly spoken on this issue in *Breverman*. Our high court was clear that "the rule requiring sua sponte instructions on all lesser necessarily included offenses supported by the evidence derives exclusively from California law." (*Breverman, supra*, 19 Cal.4th at p. 169; see *Randle, supra*, 35 Cal.4th at p. 1003 ["Any error in failing to instruct on imperfect defense of others is state law error alone" and thus subject to the *Watson* test].) And the rule has often been repeated. (See *People v. Beltran* (2013) 56 Cal.4th 935, 955 (*Beltran*) [error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof is reviewed for prejudice under the *Watson* test].) The United States Supreme Court has not squarely decided this matter in a way contrary to our state high court. (See generally *People v. Whitfield* (1996) 46 Cal.App.4th 947, 956-957; *People v. Rooney* (1985) 175 Cal.App.3d 634, 644.) Thus, we are bound to follow our high court's holding. (*Auto Equity Sales, supra*, 57 Cal.2d at p. 455.)

Furthermore, we note that the cases on which Ballesteros relies are inapposite. These cases involved the failure to issue a *requested* instruction for a theory upon which

the defendant relied (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734), or the preclusion of evidence in support of a defense theory. (*Crane v. Kentucky* (1986) 476 U.S. 683 [90 L.Ed.2d 636].) Another case on which Ballesteros relies determined that the *Chapman* analysis applied to an error involving an erroneous malice instruction which affirmatively shifted the burden of proof. (*Rose v. Clark* (1986) 478 U.S. 570 [92 L.Ed.2d 460].)

Here, the error involves the failure to give an instruction sua sponte on a theory for a lesser included offense not relied upon by defendant, but which was supported by substantial evidence. Our high court has explicitly stated that this variety of error is subject to the harmless error analysis set forth in *Watson*. (*Breverman, supra*, 19 Cal.4th at p. 178.) Under *Watson*, " 'defendant must show it is reasonably probable a more favorable result would have been obtained absent the error.' " (*Beltran, supra*, 56 Cal.4th at p. 955.) "[T]he *Watson* test for harmless error 'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' " (*Beltran*, at p. 956.) Applying *Watson*, we conclude that it is not reasonably probable that Ballesteros would have achieved a more favorable result had the court instructed on the misdemeanor manslaughter theory of involuntary manslaughter. (See *Breverman*, at p. 149.)

First, we look to the distinction between voluntary manslaughter and involuntary manslaughter Ballesteros fails to discuss. As the court instructed, involuntary manslaughter is an unlawful killing done with criminal negligence (*People v. Penny* (1955) 44 Cal.2d 861, 879; *People v. Butler* (2010) 187 Cal.App.4th 998, 1007-1008 (*Butler*)), whereas voluntary manslaughter is an unlawful killing done with an intent to kill or conscious disregard for human life based on imperfect self-defense or heat of

passion. (*People v. Blakely* (2000) 23 Cal.4th 82, 91; *People v. Lasko* (2000) 23 Cal.4th 101, 108-110.) As the trial court instructed here, "[a]n unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another and done in conscious disregard of that risk, is voluntary manslaughter or murder." The court further instructed, "[a] person acts with criminal negligence when, one, he acts in a reckless way that creates a high risk of death or great bodily injury; and, two, a reasonable person would have known that acting in that way would create such a risk." In other words, if a defendant is subjectively aware of the risk, then he can be guilty of murder or voluntary manslaughter, but if a person does not act with conscious disregard of the risk, but a reasonable person would have been aware of the risk, then the killing is involuntary manslaughter. (*Butler*, at pp. 1008-1009.)

The jury found Ballesteros guilty of voluntary manslaughter. As Ballesteros acknowledges, it appears that his jury reached this verdict based on the conclusion that Alvarez shot and killed Clay and shot Khan and Motheral in imperfect self-defense or defense of others. As set forth *ante*, the jury was instructed with one theory of involuntary manslaughter—that Alvarez committed the shooting in lawful self-defense or defense of others, but acted with criminal negligence.

Evidence introduced at trial demonstrated that Ballesteros, with others, followed the group from Peralta Avenue to Perktel Street, where they formulated the plan to meet Amaro and his group on Eleanor Avenue to fight. There was also evidence that members of the group knew at least one person among their numbers had a gun. Indeed, Ballesteros's jury heard evidence that he admitted to the police that he knew Alvarez had a gun. Ballesteros provided Alvarez a car to go to the confrontation. After the group arrived on Eleanor Avenue, they engaged with Amaro's group. Ballesteros's trial counsel argued that, while the foregoing facts were essentially undisputed, Ballesteros went to Eleanor Avenue merely to watch a fight, and Alvarez was acting in justifiable defense of Rodriguez when he shot Clay, Khan, and Motheral.

Given the evidence summarized above and the other evidence we have recounted, we conclude that it is not reasonably probable that Ballesteros would have achieved a more favorable result had the court instructed on the misdemeanor manslaughter theory of involuntary manslaughter. (See *Breverman, supra*, 19 Cal.4th at p. 149.) Given the totality of the evidence, it is not reasonably probable that, had the trial court given that instruction in addition to the involuntary manslaughter instruction it did give, that the jury would have concluded the natural and probable consequences of aiding and abetting disturbing the peace was criminally negligent involuntary manslaughter *instead of* intentional or conscious disregard for life voluntary manslaughter.

Ballesteros relies on *Woods, supra*, 8 Cal.App.4th 1570 for the proposition that, as an aider and abettor or coconspirator liable based on a natural and probable consequences theory, he may be liable for a lesser offense than that committed by the perpetrator, in this case Alvarez. Therefore, under this theory, even if it is not reasonably probable that the jury would have determined that Alvarez's intent to kill or conscious disregard for human life was lacking, this would not preclude a finding that Ballesteros was guilty of a lesser crime.

In *Woods*, this court held: "an aider and abettor is liable vicariously for any crime committed by the perpetrator which is a reasonably foreseeable consequence of the criminal act originally contemplated by the perpetrator and the aider and abettor. It follows that an aider and abettor may be found guilty of a lesser crime than that ultimately committed by the perpetrator where the evidence suggests the ultimate crime was not a reasonably foreseeable consequence of the criminal act originally aided and abetted, but a lesser crime committed by the perpetrator during the accomplishment of the ultimate crime was such a consequence. Accordingly, even when necessarily included offense instructions are not required for the perpetrator because the evidence establishes that, if guilty at all, the perpetrator is guilty of the greater offense, the trial court has a duty to instruct sua sponte on necessarily included offenses for the aider and abettor if the

evidence raises a question whether the greater offense is a reasonably foreseeable consequence of the criminal act originally contemplated and abetted, but would support a finding that a lesser included offense committed by the perpetrator was such a consequence. However, the trial court need not instruct on a particular necessarily included offense if the evidence is such that the aider and abettor, if guilty at all, is guilty of something beyond that lesser offense, i.e., if the evidence establishes that a greater offense was a reasonably foreseeable consequence of the criminal act originally contemplated, and no evidence suggests otherwise." (*Woods, supra*, 8 Cal.App.4th at pp. 1577-1578.)[44] Thus, under *Woods*, the misdemeanor manslaughter instruction would be required and a conviction of involuntary manslaughter would be possible for Ballesteros, notwithstanding the fact that the perpetrator of the shooting was guilty of a greater offense, unless "the evidence establishes that a greater offense was a reasonably foreseeable consequence of the criminal act originally contemplated, and no evidence suggests otherwise." (*Woods*, at p. 1578, italics added.)

However, *Woods* only answers the question we have already answered in favor of Ballesteros—whether the trial court erred in failing to sua sponte instruct on a misdemeanor manslaughter theory. *Woods* does not help Ballesteros in our harmless

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[44] We note that, while our high court did not mention, let alone disapprove of, *Woods*, in *Chiu*, it did state: "The natural and probable consequences doctrine is based on the principle that liability extends to reach 'the actual, rather than the planned or "intended" crime, committed on the *policy* [that] . . . aiders and abettors should be responsible for the criminal *harms* they have naturally, probably, and foreseeably put in motion.' [Citations.] We have never held that the application of the natural and probable consequences doctrine depends on the foreseeability of every element of the nontarget offense. Rather, in the context of murder under the natural and probable consequences doctrine, cases have focused on the reasonable foreseeability of the actual resulting harm or the criminal act that caused that harm." (*Chiu, supra*, 59 Cal.4th at pp. 164-165, fn. omitted.) Nevertheless, in light of our determination here, we need not consider whether *Chiu* negatively impacts the ongoing viability of this court's determination in *Woods*.

error analysis. As we have said, in applying the *Watson* test for harmless error, we " 'focus[] not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration' and in making this determination, we look to 'whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' " (*Beltran, supra*, 56 Cal.4th at p. 956.) We find that to be the case here. Given the evidence we have recounted, it was reasonably foreseeable that Alvarez might overreact and, in conscious disregard for human life, shoot at Garcia group's adversaries based on the unreasonable belief in the need to defend members of his group. At least some among the group intended Alvarez to serve as an armed lookout because, as Torres put it, he had "the protection." And as we have noted, Ballesteros knew Alvarez had a gun. Under the totality of the evidence in this case, it simply was not reasonably probable that the jury would have concluded the natural and probable consequences of aiding and abetting disturbing the peace was criminally negligent involuntary manslaughter *instead of* intentional killing or conscious disregard killing voluntary manslaughter.

Consequently, we do not find it reasonably probable that, had the jury been instructed with the misdemeanor manslaughter theory, Ballesteros would have achieved a more favorable result. (*Watson, supra*, 46 Cal.2d at p. 836.) Accordingly, the trial court's failure to give this instruction sua sponte was harmless. [45]

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[45] In light of our conclusion that defendant suffered no prejudice under *Watson*, we reject Ballesteros's contention that his trial attorney was ineffective for failing to request the misdemeanor manslaughter instruction. Ballesteros fails to establish the prejudice prong of the ineffective assistance of counsel test. To prevail on a claim of ineffective assistance of counsel, a defendant must show not just that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, but also that the deficient performance prejudiced him. (*Strickland v. Washington* (1984) 466

XI. Senate Bill No. 620

While this case was pending on appeal, the Governor signed Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill 620), effective January 1, 2018. Following the enactment of Senate Bill 620, section 12022.53 now includes language stating: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).) Section 12022.5 was amended to include an identical provision. (§ 12022.5, subd. (c).) Prior to the enactment of Senate Bill 620, courts did not have discretion to strike or dismiss these enhancements. The former language of these sections explicitly provided that the courts "shall not strike" enhancement allegations under those sections. (Former §§ 12022.5, subd. (c), 12022.53, subd. (h).)

Hector and Edward requested supplemental briefing on the impact of Senate Bill 620. However, in light of our determination that their section 12022.53, subdivision (e)(1), vicarious use firearm enhancements must be struck and the sentences imposed thereon vacated, their contentions pursuant to Senate Bill 620 have been rendered moot.

XII. Senate Bill No. 1437

A. Additional Background and Defendants' Contentions

While these appeals were pending, Senate Bill No. 1437 (Stats. 2018, ch. 1015 (Senate Bill 1437)) was signed into law. In the uncodified findings and declarations, the

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U.S. 668, 688, 691-692 [80 L.Ed.2d 674, 693-694, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) To establish prejudice, "[i]t is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' " (*Harrington v. Richter* (2011) 562 U.S. 86, 104 [178 L.Ed.2d 624, 642].) Rather, to show prejudice, defendant must show a reasonable probability that he would have received a more favorable result had counsel's performance not been deficient. (*Strickland*, at pp. 693-694; *Ledesma*, at pp. 217-218.) "The likelihood of a different result must be substantial, not just conceivable." (*Richter*, at p. 112.)

Legislature indicated that the purpose of Senate Bill 1437 was "to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) Senate Bill 1437 achieved these aims by making amendments to sections 188 and 189, statutes pertaining to the crime of murder.[46] The legislation also added section 1170.95, which provides a mechanism for defendants "convicted of felony murder or murder under a natural and probable consequences theory" (§ 1170.95, subd. (a)) to file a petition in the sentencing court to have a murder conviction vacated and to be resentenced. The law became effective January 1, 2019.

We granted the requests of defendants Hector, Edward, and Ballesteros to file supplemental briefs to address Senate Bill 1437. Hector and Edward each assert that, as a result of the passage of Senate Bill 1437, count one convicting them of murder under the natural and probable consequences doctrine must be reversed. They also assert that counts two and three, convicting them of attempted murder, must also be reversed because those counts too were premised on the natural and probable consequences

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[46] Section 188 now provides that, with the exception of the felony murder amendment in section 189, subdivision (e), "in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).)

The amendment to section 189 changed the felony murder rule to require that, in order to be convicted of first degree murder under that theory, one of the following must be proved: "(1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189, subd. (e).)

doctrine, which, they assert, has been abrogated by Senate Bill 1437. Similarly, Ballesteros asserts that his conviction of voluntary manslaughter and his two convictions of attempted voluntary manslaughter, all premised on the natural and probable consequences doctrine, must be reversed as a result of the passage of Senate Bill 1437.

B. Retroactivity

Recently, the Court of Appeal for the Second Appellate District, Division Five, addressed "whether on direct appeal [a defendant] can avail himself of the ameliorative benefits of Senate Bill No. 1437 . . . ." (*People v. Martinez* (2019) 31 Cal.App.5th 719, 722 (*Martinez*).) As these defendants do here, the defendant in *Martinez* discussed *People v. Conley* (2016) 63 Cal.4th 646, in which our high court "considered whether [the] holding [in *In re Estrada* (1965) 63 Cal.2d 740] compelled a conclusion that the Three Strikes Reform Act of 2012, commonly known as Proposition 36, applied retroactively to defendants whose judgments were not yet final." (*Martinez*, at p. 725.) Additionally, the defendant in *Martinez*, like these defendants, discussed *People v. DeHoyos* (2018) 4 Cal.5th 594, "which presented the question of whether Proposition 47 ('the Safe Neighborhoods and Schools Act') applied retroactively to nonfinal cases on direct appeal." (*Martinez*, at p. 726.) In both *Conley* and *DeHoyos*, our high court concluded that the postconviction procedures established by the legislation were the exclusive means for defendants to obtain relief. (*Martinez*, at pp. 725, 727.) The *Martinez* court concluded that the "analytical framework animating the decisions in *Conley* and *DeHoyos* is equally applicable" to the question of the retroactivity of Senate Bill 1437 on direct appeal. (*Martinez*, at p. 727.)

As the *Martinez* court recognized, "Senate Bill 1437 is not silent on the question of retroactivity. Rather, it provides retroactivity rules in section 1170.95. The petitioning procedure specified in that section applies to persons who have been convicted of felony murder or murder under a natural and probable consequences theory. It creates a special mechanism that allows those persons to file a petition in the sentencing court seeking

vacatur of their conviction and resentencing. In doing so, section 1170.95 does not distinguish between persons whose sentences are final and those whose sentences are not. That the Legislature specifically created this mechanism, which facially applies to both final and nonfinal convictions, is a significant indication Senate Bill 1437 should not be applied retroactively to nonfinal convictions on direct appeal." (*Martinez, supra*, 31 Cal.App.5th at p. 727.)

The *Martinez* court took particular note of subdivision (d)(3) of section 1170.95, which provides that at the hearing on the petition, " '[t]he prosecutor and the petitioner may rely on the record of conviction *or offer new or additional evidence to meet their respective burdens*.' " (*Martinez, supra*, 31 Cal.App.5th at p. 724, quoting § 1170.95, subd. (d)(3), italics added.) The court reasoned, "[p]roviding the parties with the opportunity to go beyond the original record in the petition process, a step unavailable on direct appeal, is strong evidence the Legislature intended for persons seeking the ameliorative benefits of Senate Bill 1437 to proceed via the petitioning procedure. The provision permitting submission of additional evidence also means Senate Bill 1437 does not categorically provide a lesser punishment must apply in all cases, and it also means defendants convicted under the old law are not necessarily entitled to new trials. This, too, indicates the Legislature intended convicted persons to proceed via section 1170.95's resentencing process rather than avail themselves of Senate Bill 1437's ameliorative benefits on direct appeal." (*Martinez, supra*, 31 Cal.App.5th at p. 728.)

The court in *Martinez* held that the defendant could not avail himself of the ameliorative benefits of Senate Bill 1437 on direct appeal and that he must seek relief pursuant to the "special mechanism" provided by the Legislature in section 1170.95. (*Martinez, supra*, 31 Cal.App.5th at pp. 727, 729.) Since *Martinez*, other Courts of Appeal, including a panel of this court, have followed its reasoning and concluded that defendants on direct appeal must file section 1170.95 petitions. (See *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1149-1158; *People v. Carter* (2019) 34 Cal.App.5th 831,

835; *In re R.G.* (2019) 35 Cal.App.5th 141, 145-146; *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1113-1116; *People v. Munoz* (2019) 39 Cal.App.5th 738, 749-753 (*Munoz*); *Cobbs, supra,* 41 Cal.App.5th at pp. 1077-1082 [habeas corpus petition seeking to vacate conviction based on Senate Bill 1437 after murder conviction was affirmed on appeal].)

We agree with these courts and conclude that the changes effected by Senate Bill 1437 do not apply retroactively on direct appeal. Indeed, it is apparent that the Legislature did not intend to provide Senate Bill 1437 relief to *all* defendants prosecuted on felony murder or natural and probable consequences theories. When the prosecution can establish culpability under a different theory of murder based on the record of conviction or new or additional evidence, a defendant previously convicted on a theory invalidated by Senate Bill 1437 will not be given this statutory relief and will remain convicted. Accordingly, defendants "convicted of . . . murder under a natural and probable consequences theory" are entitled to follow the procedure in section 1170.95. However, they are not entitled to Senate Bill 1437 relief on direct appeal. (*Martinez, supra,* 31 Cal.App.5th at p. 727.)[47]

We further conclude that Hector's and Edward's contention that the *Martinez* interpretation of Senate Bill 1437 raises constitutional concerns is without merit. Section 1170.95 has no bearing on new trials for defendants whose first degree murder convictions are being reversed under *Chiu*. And contrary to these defendants' contention,

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[47] We also note that the Legislature did not intend complete exoneration if the prosecution is unable to establish another theory of murder based on the record of conviction or "new or additional" evidence under section 1170.95, subdivision (d)(3). Where "murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes." (§ 1170.95, subd. (e).)

we do not agree that the interpretation of section 1170.95 of the *Martinez* court and those courts following *Martinez* " 'raise serious and doubtful constitutional questions . . . .' "

C. Senate Bill 1437 and Manslaughter

We are reversing the Garcia brothers' attempted murder convictions, so their Senate Bill 1437 contentions concerning these convictions are moot. However, as we will discuss, a number of courts have held that Senate Bill 1437 has no application to convictions for attempted murder. The reasoning of these courts is pertinent to Ballesteros's claim for relief from his convictions of voluntary manslaughter and attempted voluntary manslaughter.

Section 1170.95 contemplates potential relief for "[a] person convicted of *felony murder* or *murder* under a natural and probable consequences theory . . . ." (§ 1170.95, subd. (a), italics added.) The only relief provided under the statute is vacatur of a *murder* conviction. (§ 1170.95, subds. (a), (e).) As the People note, section 1170.95 does not so much as mention attempted murder, voluntary manslaughter, or attempted voluntary manslaughter.

Moreover, as we have noted *ante*, the purpose of Senate Bill 1437 was "to amend the felony murder rule and the natural and probable consequences doctrine, *as it relates to murder, to ensure that murder liability is not imposed* on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f), italics added.) This indicia of legislative intent reveals the limited nature of the legislative change. (See *People v. Canty* (2004) 32 Cal.4th 1266, 1280 [courts may consider statements of the intent of the enacting body contained in an uncodified findings and declarations preamble in construing a statute].) Additionally, the Legislature indicated in its findings and declarations that "a person should be punished for his or her actions according to his or her own level of individual culpability," and addressed "lengthy sentences that are not commensurate with the culpability of the individual" by

focusing solely on the crime of murder and declaring that a "person's culpability for *murder* must be premised upon that person's own actions and subjective mens rea." (Stats. 2018, ch. 1015, § 1, subds. (d), (e), (g), italics added.) Based on these additional findings and declarations, it is apparent that the Legislature desired to address life sentences imposed on people convicted of murder who did not act with malice aforethought or, in the context of felony murder, did not act with a culpable mental state commensurate with a life sentence.

Our colleagues in the Court of Appeal for the Second Appellate District, Division Seven, recently arrived at the same conclusions. In *People v. Lopez* (2019) 38 Cal.App.5th 1087 (*Lopez*), the court concluded that Senate Bill 1437 did not modify accomplice liability for attempted murder. (*Lopez*, at pp. 1103-1107.) The *Lopez* court relied on a number of the same factors as we have, noting that Senate Bill 1437 did not mention the crime of attempted murder (*Lopez*, at pp. 1103, 1104), the stated purpose of Senate Bill 1437, discussed *ante* (*Lopez*, at p. 1104), and the fact that section 1170.95 identifies the limited class of individuals entitled to relief under its provisions (*Lopez*, at pp. 1104-1105).

The *Lopez* court also considered the legislative history of Senate Bill 1437 to buttress its interpretation of the statutory language. (*Lopez*, *supra*, 38 Cal.App.5th at p. 1105; see generally *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 316 ["even though recourse to extrinsic material is unnecessary given the plain language of the statute, we may consult it for material that buttresses our construction of the statutory language"].) The *Lopez* court stated: "When describing the proposed petition process, the Legislature consistently referred to relief being available to individuals charged in a complaint, information or indictment 'that allowed the prosecution to proceed under a theory of first degree felony murder, second degree felony murder, or murder under the natural and probable consequences doctrine' and who were 'sentenced to first degree or second degree murder.' [Citation.] In addition, when discussing the fiscal impact and assessing

the likely number of inmates who may petition for relief, the Senate Committee on Appropriations considered the prison population serving a sentence for first and second degree murder and calculated costs based on that number. [Citation.] The analysis of potential costs did not include inmates convicted of attempted murder." (*Lopez*, at p. 1105.)

In *Lopez*, the defendants argued that, "by redefining the elements of murder, Senate Bill 1437 impliedly eliminated the natural and probable consequences doctrine as a basis for finding an aider and abettor guilty of attempted murder . . . ." (*Lopez, supra*, 38 Cal.App.5th at p. 1105.) The court found the argument unavailing, stating: the defendants' "premise of this implied repeal argument is that, generally to be guilty of an attempt to commit a crime, the defendant must have specifically intended to commit all the elements of that offense. Since a conviction for murder now requires proof of malice except as specified in section 189, subdivision (e), and malice may not be imputed to a person based solely on his or her participation in an underlying crime, they reason, the natural and probable consequences theory of aider and abettor liability is no longer viable. [¶] [The defendants'] premise, that to be guilty of an attempt an accomplice must have shared the actual perpetrator's intent, is correct as to direct aider-and-abettor liability [citations], but it is inapplicable to offenses charged under the natural and probable consequences doctrine, which is based on a theory of vicarious liability, not actual or imputed malice. [Citation.] As a matter of statutory interpretation, Senate Bill 1437's legislative prohibition of vicarious liability for murder does not, either expressly or impliedly, require elimination of vicarious liability for attempted murder." (*Lopez*, at pp. 1105-1106.)

Recently, the court in *Munoz, supra*, 39 Cal.App.5th 738, agreeing with *Lopez*, held that a person convicted of attempted murder is not entitled to relief pursuant to Senate Bill 1437. (*Id.*, at p. 753-754.) As the *Munoz* court noted, "[w]here the words of

the statute are clear, we are not at liberty to add to or alter them to accomplish a purpose that is not apparent on the face of the statute or in its legislative history." (*Id*., at p. 755.)

We agree with the reasoning in *Lopez* and *Munoz*. And that reasoning has even greater force relative to the offenses of voluntary manslaughter and attempted voluntary manslaughter. As relevant here, Senate Bill 1437 amended section 188, defining malice. Voluntary manslaughter involves an unlawful killing *without malice*. (§ 192, *People v. Lasko* (2000) 23 Cal.4th 101, 108.) And Senate Bill 1437 made no reference to section 192, the provision defining voluntary manslaughter.

Nothing has been presented that leads us to conclude that the Legislature intended to address the circumstances of or punishment for any defendants convicted of voluntary manslaughter or attempted voluntary manslaughter under a natural and probable consequences theory. If they had, it would have been simple enough to make findings and declarations setting forth the need for such a change and to enact a statute with language so providing. Instead, the plain language of the legislative findings and declarations as well as the codified statute is limited to murder in an effort to ameliorate the penalty for murder liability grounded on felony murder and natural and probable consequences theories. Thus, a defendant convicted of voluntary manslaughter or attempted voluntary manslaughter is not eligible to petition for relief in the sentencing court pursuant to section 1170.95.

Ballesteros points out that a subparagraph of the legislative findings and declarations for Senate Bill 1437 states: "There is a need for statutory changes to more equitably sentence offenders in accordance with their involvement *in homicides*." (Stats. 2018, ch. 1015, § 1, subd. (b), italics added.) Isolating this finding out of context, he seeks to have us expand the scope of Senate Bill 1437 to include *all homicides*, ignoring the other subdivisions in the findings and declarations discussed above demonstrating that the Legislature fulfilled its perceived need for statutory changes by changing the murder statutes and expressly stating the purpose of the bill was to address the felony

murder rule and "the natural and probable consequences doctrine, as it relates to murder." (Stats. 2018, ch. 1015, § 1, subd. (f).) As we have noted, no changes were made to section 192, the statute defining voluntary manslaughter, and Ballesteros cannot point to any legislative history leading up to the enactment of Senate Bill 1437 discussing any form of homicide other than murder. Thus, we must conclude the Legislature did not intend to change the sentences for persons convicted of voluntary manslaughter. As the Legislature declared, "[t]he power to define crimes and fix penalties is vested exclusively in the legislative branch" (Stats. 2018, ch. 1015, § 1, subd. (a)), and Ballesteros points to no authority empowering us to change the law of voluntary manslaughter where the Legislature has not. Indeed, our role is to apply a statute according to its terms, not to read into it provisions not supported by the statutory language. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 694.) " '[W]e presume the Legislature intended everything in a statutory scheme, and we should not read statutes to omit expressed language or include omitted language.' " (*People v. Connor* (2004) 115 Cal.App.4th 669, 691, quoting *Jurcoane v. Superior Court* (2001) 93 Cal.App.4th 886, 894; accord, *Munoz, supra*, 39 Cal.App.5th 755.)

Ballesteros asserts that it would be an absurd result to conclude the natural and probable consequences doctrine has been abrogated for murder and not voluntary manslaughter and that applying the amendments to voluntary manslaughter would "more equitably sentence offenders in accordance with their involvement in homicides," consistent with section 1, subdivision (b) of the legislative findings and declarations. (Stats. 2018, ch. 1015, § 1, subd. (b).) As the court in *Munoz* has noted, "[t]he 'absurdity exception requires much more than [a] showing that troubling consequences may potentially result if the statute's plain meaning were followed or that a different approach would have been wiser or better. [Citations.] Rather, "[t]o justify departing from a literal reading of a clearly worded statute, the results produced must be so unreasonable the Legislature could not have intended them." [Citation.] Moreover, our courts have wisely

cautioned that the absurdity exception to the plain meaning rule "should be used most sparingly by the judiciary and only in extreme cases else we violate the separation of powers principle of government. [Citation.] We do not sit as a 'super-legislature." ' " (*Munoz, supra*, 39 Cal.App.5th at p. 758.)

Moreover, we find nothing absurd about a legislative choice to eliminate life sentences for persons convicted of murder who did not have the requisite mental state for that offense, but maintaining the natural and probable consequences doctrine for other offenses in the Penal Code that do not carry the same life sentences. Indeed, the punishment for voluntary manslaughter is a triad of 3, 6, or 11 years (§ 193, subd. (a).) Given those potential sentences we do not find maintaining extended derivative liability under the natural and probable consequences doctrine for voluntary manslaughter to be absurd. (See *Munoz, supra*, 39 Cal.App.5th at pp. 755-759 [conclusion that Senate Bill 1437 does not apply to attempted murder does not yield absurd results].) Indeed, Ballesteros was sentenced only to the midterm of six years for voluntary manslaughter and one year for each of the attempted voluntary manslaughter convictions. We cannot find that these sentences were inconsistent with his level of culpability and even if they were, it is up to the Legislature to provide a remedy.

D. Instructions on Natural and Probable Consequences and Senate Bill 1437

Edward and Hector argue that the reversal of their murder convictions is required because the jury instructions permitted a conviction for that offense based on the natural and probable consequences doctrine, which has been invalidated by Senate Bill 1437. They rely upon *Guiton, supra*, 4 Cal.4th at page 1129 and *People v. Green* (1980) 27 Cal.3d 1, 69-70 (*Green*), for the proposition that "[w]hen the jury is instructed on a legally insufficient theory, reversal is required 'absent a basis in the record to find that the verdict was actually based on a valid ground.' " Neither case has application here. Those cases involved situations where the jury was presented with multiple prosecution theories, but factually, there was insufficient evidence to support one or more of the

theories. (See *Guiton*, at p. 1119 [defendant was prosecuted on theories of sale and transportation of a controlled substance, but the evidence did not support the sale theory]; *Green*, at p. 71 [kidnapping prosecuted on three asportation theories related to three segments of the movement of the victim, two of which were legally insufficient].) However, here we address legislative abrogation of a prosecution theory post-conviction. In abrogating the natural and probable consequences doctrine as it relates to murder, the Legislature did not say that that theory was previously invalid and did not suggest outright reversal is warranted and indeed, as noted, has provided a special procedural mechanism for this situation in section 1170.95 where new and additional evidence can be presented. Accordingly, while the natural and probable consequences theory is invalid going forward, the Legislature did not intend by its legislative change that all defendants previously convicted on that theory escape all liability.

Thus, this is not the typical situation where an appellate court has found insufficient evidence to support a theory of culpability or where a theory of culpability has been invalidated by an appellate court. In such situations, there is no legislative mechanism for addressing those convictions based on the now-invalidated theory. Here, there is. Indeed, implicit in the section 1170.95, subdivision (d)(3), provision allowing the prosecution to present new and additional evidence is the apparent recognition that in some cases there may have been available theories the prosecutor decided not to advance at trial. Such prosecutorial decisions could have been based on the determination to streamline the presentation, to advance only theories perceived at that time to be the strongest, the unavailability of witnesses who could prove the theory not advanced, the nature of the proof relative to theories not advanced, or the strength or weaknesses of that proof. Accordingly, the Garcia brothers' instructional error claim based on Senate Bill 1437 fails.

Ballesteros argues that his instructions were erroneous because the natural and probable consequences doctrine has been abrogated for all forms of homicide, again

focusing in isolation on the one finding in the uncodified findings and declarations that references the word "homicides." (Stats. 2018, ch. 1015, § 1, subd. (b).) But he also notes that section 188 was amended to add the following language: "Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).) And he again ignores the fact that section 192 makes clear, "[m]anslaughter is the unlawful killing of a human being *without malice*." (Italics added.) Again, Senate Bill 1437 did not amend section 192, or, for that matter, any statute, other than sections 188 and 189, under which liability could be imposed under the natural and probable consequences doctrine.

We conclude that the natural and probable consequences doctrine has not been abrogated by Senate Bill 1437 for voluntary manslaughter and attempted voluntary manslaughter. Thus, Ballesteros' instructional error argument based on the new legislation fails.

DISPOSITION

Alvarez's convictions of attempted murder on counts two and three are reversed and the sentences imposed thereon vacated. The personal use of a firearm enhancement true findings on counts two and three are struck, and the sentences imposed thereon, are vacated. The true findings on the section 186.22, subdivision (b), gang enhancements on all counts are struck, and the sentences imposed thereon, are vacated. The trial court is directed to prepare an amended abstract of judgment reflecting these modifications and to forward certified copies of the amended abstract to the Department of Corrections and Rehabilitation. As so modified, the judgment as to Alvarez is affirmed.

Hector's and Edward's convictions of attempted murder on counts two and three are reversed and the sentences imposed thereon vacated. The true findings on all of the gang enhancements under section 186.22, subdivision (b), and the section 12022.53, subdivision (e)(1), vicarious use firearm enhancements are struck, and the sentences imposed thereon, as to Hector and Edward are vacated. Hector's and Edward's

convictions of first degree murder on count one are reversed unless the People accept a reduction of the convictions to second degree murder. If, after the filing of the remittitur in the trial court, the People do not bring Hector and Edward to retrial on the charge of first degree murder within the time set forth in section 1382, subdivision (a)(2)—60 days unless waived by the defendant—the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction of second degree murder and shall resentence Hector and Edward accordingly.[48] We vacate the stays on the vicarious arming enhancements under section 12022, subdivision (a)(1), on count one and order execution of the previously imposed one-year sentences on those enhancements. The trial court is directed to prepare amended abstracts of judgment reflecting these modifications and to forward certified copies of the amended abstracts to the Department of Corrections and Rehabilitation. As modified, the judgments as to Hector and Edward are affirmed.

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[48] This procedure is without prejudice to Hector and Edward to petition in the sentencing court pursuant to section 1170.95 for relief as to their murder convictions on count one.

The judgment as to Ballesteros is affirmed.

/s/
MURRAY, J.

We concur:

/s/
BUTZ, Acting P. J.

/s/
HOCH, J.